Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

F. DALE ROWLAND, DENISE ROWLAND,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Were Petitioners denied constitutional due process when the Judicial Officer, in overruling the Administrative Law Judge's Decision and Opinion dismissing the Animal & Plant Health Inspection Service's ("APHIS") Complaint without the benefit of a hearing, imposed a disqualification which amounts to a deprivation of property requiring notice and hearing?

2. Did the Sixth Circuit Court of Appeals err in determining that the Petitioners had entered a "sore" horse in light of the USDA veterinarians' testimony?

3. Was it error for the court to hold that the interpretation of the "Scar Rule," 9 C.F.R. § 11.3, Horse Protection Act, 15 U.S.C.A. § 1821, *et seq.*, to apply to Petitioners even where the horse's scars were fully healed was not arbitrary, capricious, or manifestly contrary to the Act?

4. Was it error for the Court to determine that Petitioners' horse was sore at the time of its entry into the Greenback Classic in accordance with the Horse Protection Act?

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Petitioners, F. Dale Rowland and Denise Rowland, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

In addition to the published opinion of the United States Court of Appeals for the Sixth Circuit, *Rowland v. United States Department of Agriculture*, 43 F.3d 1112 (6th Cir. 1995), decided January 13, 1995, (which is sought to be reviewed by this Honorable Court by this Petition) the following opinions were rendered in this case:

(1) December 4, 1992, Decision and Order by the Honorable USDA Administrative Law Judge Edwin S. Bernstein (copy included in Appendix); and

(2) August 25, 1993, Decision and Order by the Honorable USDA Judicial Officer, Donald A. Campbell (copy included in Appendix).

STATEMENT OF JURISDICTION

Petitioners respectfully request this Honorable Court to review the opinion of the United States Court of Appeals for the Sixth Circuit decided on January 13, 1995, pursuant to jurisdiction vested therein by 28 U.S.C.A. § 1254.

In this case, Petitioners filed a Petition for Rehearing on January 31, 1995. An order denying the Petition for Rehearing was filed February 22, 1995.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions, statutes, and regulations. (The text is set forth in the appendix hereto.)

(a) The following provision of The Constitution of the United States:

(1) U.S. Const. Amend. V.

(b) The following statutes:

(1) "The Horse Protection Act," 15 U.S.C.A. §§ 1821, *et seq.*

(c) The following regulation:

(1) 9 C.F.R. § 11.3

STATEMENT OF THE CASE

This case stems from a Complaint, filed by the Animal and Plant Health Inspection Service ("APHIS"), alleging that Petitioners, F. Dale Rowland and Denise Rowland, violated the Horse Protection Act ("the Act"), 15 U.S.C.A. § 1821, *et seq.* The Petitioners allegedly violated 15 U.S.C.A. § 1824(2)(B) by entering for purposes of showing the horse known as "Quarterback Stock" at the Greenback Classic Horse Show at Randolph, Ohio on June 22, 1991.

Petitioners filed a timely answer denying the material allegations against them. A two day administrative hearing was held in Cleveland, Ohio on August 4th and 5th, 1992 before the

Administrative Law Judge, Edwin S. Bernstein. Both parties filed post-hearing briefs. Upon consideration of all oral and documentary evidence presented, the Administrative Law Judge ("ALJ") entered a Decision and Order on December 4, 1992, in which the Complaint against the Rowlands was dismissed. The ALJ concluded that the Rowlands' horse, "Quarterback Stock," was not "sore" pursuant to the applicable statutory standard set forth in the Code of Federal Regulations, 9 C.F.R. § 11.3 (the "Scar Rule").

Appeal from the ALJ's Decision and Order was taken on January 22, 1993, by APHIS, the complainant. In support of its Appeal, the complainant filed a Memorandum to which Petitioners filed their response on March 6, 1993. No hearing or oral argument was held at this stage of the proceedings. Donald A. Campbell, the Judicial Officer ("JO") presiding over the administrative appeal, entered his Decision and Order on August 25, 1993, wherein he concluded "Quarterback Stock" was "sore" within the meaning of the Scar Rule.

The JO modified the Decision and Order of the ALJ and assessed a joint civil penalty of $2,000.00 against Petitioners and disqualified them for one year from showing, exhibiting, entering, or otherwise participating in any horse show, exhibition, sale or auction.

Petitioners subsequently filed an appeal with the Sixth Circuit Court of Appeals pursuant to 15 U.S.C.A. § 1825(b)(2). Oral arguments were heard on September 22, 1994. In its Decision dated January 13, 1995, the Court of Appeals, Suhrheinrich, Circuit Judge, held that: (1) finding that Petitioner's horse was "sore" was not clearly erroneous in light of the USDA veterinarians' testimony, and (2) interpretation of the "Scar Rule" by the Judicial Officer was to apply even where the horse's scars have healed was not arbitrary, capricious, or

manifestly contrary to the Act. *Rowland v. United States Department of Agriculture*, 43 F.3d 1112 (6th Cir. 1995). Petitioners' petition for review was therefore denied.

REASONS FOR GRANTING THE WRIT

Petitioners respectfully request that the Honorable Supreme Court of the United States of America grant this Petition for Writ of Certiorari to determine once and for all the proper procedure and application of the "Scar Rule" and the Horse Protection Act. 9 C.F.R. § 11.3, 15 U.S.C.A. § 1821, *et seq.*

The Horse Protection Act (the "Act") was made into federal law in 1975. In the twenty years of its existence the Act, along with the applicable federal regulations, has never been brought before this Honorable Court for interpretation. However, the federal Circuit Courts with jurisdiction over states that are prevalent in the Tennessee Walking Horse industry, have acted inconsistently with the language of the Act and in light of each other's decisions regarding the Act. The questions presented for review in this case involve important issues of federal law that have not been but should be resolved by this Court as they affect the lives of a multitude of people actively participating in the Tennessee Walking Horse industry. This industry is a multimillion dollar industry throughout more than ten states. The Tennessee Walking Horse is popularly known for its characteristic high stepping gait. These horses are bred, trained and shown for competition and for pleasure.

I.

PETITIONERS WERE DENIED CONSTITUTIONAL DUE PROCESS WHEN THE JUDICIAL OFFICER, IN OVERRULING THE ADMINISTRATIVE LAW JUDGE'S DECISION AND OPINION DISMISSING APHIS' COMPLAINT WITHOUT THE BENEFIT OF A HEARING, IMPOSED A ONE-YEAR DISQUALIFICATION WHICH AMOUNTS TO A DEPRIVATION OF PROPERTY REQUIRING NOTICE AND HEARING.

The first question that this Court is being asked to review is whether Petitioners were denied constitutional due process when the JO overruled the ALJ's dismissal of the Complaint filed by APHIS without the benefit of notice or a hearing. The Due Process Clause of the Fifth Amendment guarantees that "no person shall . . . be deprived of life, liberty, or property, without due process of law." The Court's precedents have established the general rule that individuals must receive notice and be extended an opportunity to be heard before there is any governmental deprivation of property. *United States v. James Daniel Good Real Property, et al.*, __ U.S. __, 114 S. Ct. 492, 126 L. Ed. 490 (1993).

There is a long line of case law decided by this Court setting forth the basic tenets of a person's right to be heard before being denied the use and enjoyment of his property. The constitutional right to be heard is a basic duty of the government to follow a fair process of decisionmaking when it acts to deprive a person of his possessions. The Court's long line of decisions demonstrates the high regard that is placed on a person's right to enjoy what is his. *See Baldwin v. Hale*, 68 U.S. 223 (1863); *Windsor v. McVeigh*, 93 U.S. 274 (1876); *Hovey v. Elliott*, 167 U.S. 409 (1897); *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972).

Petitioners were not afforded a hearing before the JO,

Donald A. Campbell, prior to his overruling of the ALJ's Decision and Opinion dismissing the Complaint by APHIS. In overruling the Decision and Opinion of the ALJ, the JO imposed a civil penalty of $2,000 against the Rowlands and imposed a one year disqualification "from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale or auction." *Rowland v. United States Department of Agriculture*, 43 F.3d 1112, 1114 (6th Cir. 1995). The effect of the JO's decision was the deprivation of the use and enjoyment of Petitioners' property. This is inconsistent with the safeguard of a hearing before such deprivation of use of property, pursuant to the Fifth Amendment of the Constitution of the United States.

At oral hearing, a number of issues could have been explained to the JO before he acted to deprive Petitioners of their property. Petitioners were denied the opportunity to be heard. There seems to have been an extreme abuse of governmental authority in the way the JO reviewed this case. Judge Boyce F. Martin, Jr., Circuit Judge, in his concurring opinion in *Polch v. United States Department of Agriculture*, 32 F.3d 569 (6th Cir. 1995) (Unpublished) stated it best by questioning the "value of an administrative process in which a judicial officer can substitute at his discretion, and without granting . . . Petitioner[s] any further hearing, a harsher penalty than that imposed by an administrative law judge after reasoned analysis."[1]

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1. Circuit Judge Boyce F. Martin, Jr. made his observation based on the JO's imposition of an increased civil penalty and the criminal sanctions of a one year disqualification, thus modifying the ALJ's initial Decision without further hearing, similar to the case at bar.

The *Polch* case can be analogized to the case at bar. The JO imposed a civil and criminal penalty without further hearing after the ALJ dismissed the Complaint against Petitioners.

II.

THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN DETERMINING THAT THE PETITIONERS HAD ENTERED A "SORE" HORSE IN LIGHT OF THE USDA VETERINARIANS' TESTIMONY.

Before competition at the Greenback Classic Horse Show, Petitioners' horse, "Quarterback Stock," was inspected by the Designated Qualified Person ("DQP") to determine whether the animal had been "sored."[2] The horse was subsequently passed by the DQP. Two USDA veterinarians, Dr. Frances Miava Binkley and Dr. Gwen Lee discovered scarring of the horse and both identically characterized it as "obvious scarring-front fetlock." The two doctors were explicit to note in their documentation and affidavits that the scarring was indeed on the front fetlocks.

The Scar Rule, 9 C.F.R. § 11.3 (*See* Appendix D), provides in pertinent part that:

> [h]orses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions . . . The scar rule criteria are as follows:
>
> (a) The anterior and anterior-lateral surfaces of the fore *pasterns* (extensor surface) must be free of bilateral

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2. The DQP is hired by the management of a show to inspect participating horses in order to protect itself from potential liability. If a "sore" horse is allowed to participate in the show and a DQP was not utilized, the show management could be potentially liable. *Elliott v. Administrator, Animal & Plant Inspection Serv.*, 990 F.2d 140, 142 n. 4, (4th Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 191, 126 L. Ed. 2d 149 (1993).

> granulomas,[3] other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including but not limited to, excessive loss of hair.
>
> (b) The posterior surfaces of the *pasterns* (flexor surface), including the suculus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation. 9 C.F.R. § 11.3.

(Emphasis added).

The Act prohibits, pursuant to 15 U.S.C.A. § 1824(2)(B), the following conduct:

> . . . The . . . entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore . . .

The Scar Rule establishes explicit criteria required for determining whether a horse is "sore" within the meaning of the rule. The main criterion is the existence of scarring in the horse's pastern areas.[4] There is no mention of there being a violation of the Scar Rule if there is scarring on the horse's fetlocks.

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3. Granuloma is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents.

4. The pasterns is the area of the horse's foot directly above the hoof. *Wagner v. Department of Agriculture*, 28 F.3d 279, n. 2, (3d Cir. 1994).

The Sixth Circuit Court of Appeals disagreed with Petitioners' contention that the evidence in the record, supported by testimony of the USDA veterinarians, fails to support soreness because of the location of the scars. The Sixth Circuit gave consideration to the explanations of the veterinarians of why they stated in their documentation and affidavits, the existence of "obvious scarring-front fetlocks." The veterinarians each explained that they used the term "fetlocks" in their notes in order to remind them of the scars. These are two veterinarians who supposedly had ample training and knew what to look for in violations of the Scar Rule. There was a brief time lapse between the examination of the horse and the documentation. If the veterinarians meant that there was scarring in the pasterns, would not it follow that their documentation would reflect *pasterns* and not fetlocks, as they recorded? There is much inconsistency in the veterinarians' testimony as to the location of the scars that were on "Quarterback Stock." The Sixth Circuit, in its decision and opinion on this matter, chose to follow the plain meaning of the statute, yet deviated from the language of the statute to allow a violation of the rule with the determination of scarring on an area not contemplated by the statute.

It is interesting to note that Dr. Binkley has performed hundreds of inspections and examinations of horses to determine conformity with the Act. Yet, she still cannot get it right. The uncontroverted evidence establishes that Dr. Binkley had inspected "Quarterback Stock" at an earlier show and had passed him as not being "sore" within the meaning of the Act. The scars on "Quarterback Stock's" fetlocks were fully healed though they remained hairless.

Dr. Binkley was also one of the examining veterinarians in *Wagner v. Department of Agriculture*, 28 F.3d 279 (3d Cir. 1994). Dr. Binkley had occasion to examine and inspect a horse named, "Sir Shaker," at the Eastern Classic Horse Show in Quentin,

Pennsylvania. The day after the show, Dr. Binkley signed an affidavit documenting the inspection noting significant sensitivity after palpating the area on the front of the *pasterns*, 1"-2" above the coronary band. *Id.* at 282 (emphasis added). This was a clear violation of the Act. The sensitivity discovered in the horse's pastern area,[5] caused Dr. Binkley to determined the horse to be "sore." In *Wagner, supra*, Dr. Binkley was not confused as to the location of the sensitivity. Yet, in the case at bar, Dr. Binkley did not differentiate between pasterns and fetlocks in her documentation.

The findings of the Sixth Circuit that the scarring was on the horse's pastern area is, therefore, clearly erroneous. If Drs. Binkley and Lee meant to state that the scars were on the pastern area, they would have. Both doctors were supposedly well versed in the application of the Act at the time of examination of "Quarterback Stock" and knew that for a violation to have occurred, scarring would have to be in the pastern area not the high fetlock area.

Given the clear statutory language of both the Act and the Scar Rule, with their explicit reference to the pasterns of the horse, the failure of the USDA veterinarians to clearly differentiate between the pastern and fetlock areas is inexplicable. These two areas of the animal are distinguishable.

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5. The Tennessee Walking Horse is known for its characteristic high stepping gait. This high stepping is what the horse is graded on in competition and shows. These horses improve their step through training and by the use of 6 ounce chains. This practice is legal and known throughout the industry. The chains are placed around the horse's foot at the pastern area. The horse attempts to step out of the chains and this enhances the high step already present in the horse. The abusers would apply chemicals or physical lesions in order to increase the sensitivity of the horse and cause it to step higher. This practice is not only inhumane but it also offers an unfair advantage to the trainers who do this.

Their documentation referred to scarring in the fetlock area, while their oral testimony before the ALJ consisted of references to both the pastern and fetlock areas. The Act and Scar Rule proscribe scars in a horse's pastern areas.[6] Neither the federal statute nor the regulation make it a violation for a horse to have scars in its fetlock area. It actually makes no sense for there to be "advantageous scarring" in that area given the mechanics of the Tennessee Walking Horse. *See* n.5 *supra*.

Furthermore, the testimony of the USDA veterinarians included references that the scars on "Quarterback Stock" were fully healed. Dr. Michael Bricker, D.V.M., Petitioners' expert, testified that the scars on "Quarterback Stock" were of such a condition and healed to such a degree as to suggest they could be "five or ten years old." The USDA veterinarians testified that upon the touching or palpation of the scars there was *no* abnormal sensitivity.

Therefore, the findings of the Sixth Circuit in regard to the JO's determination of the evidence presented by the USDA veterinarians are in error.

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6. The Act contemplates ending the inhumane practice of soring horses in order to gain an unfair competitive advantage over those who use skill to train their horses. When a horse has been "sored," some sort of caustic substance may have been applied in order to cause the animal so much pain as to exaggerate the characteristic high stepping gait. The Scar Rule presumes soring of an animal with the presence of scars in the horses pastern areas, the area of the horse most likely to give the competitive edge.

III.

IT WAS ERROR FOR THE COURT TO HOLD THAT THE INTERPRETATION OF THE "SCAR RULE," HORSE PROTECTION ACT, 15 U.S.C.A. § 1821, *ET SEQ.*, TO APPLY TO PETITIONERS EVEN WHERE THE HORSE'S SCARS WERE FULLY HEALED WAS NOT ARBITRARY, CAPRICIOUS OR MANIFESTLY CONTRARY TO THE ACT.

The Act was passed by Congress in 1975 in response to the concern of inhumane practices toward horses. The purpose of the Act is two-fold. The Act prohibits "soring not only to prevent [excruciating] pain to the animals, but also to prevent owners who allow their trainers to sore their horses from gaining an unfair competitive advantage over trainers who relied on skill and patience." *Rowland*, 43 F.3d at 1116. *See also*, *Elliott*, 990 F.2d at 144.

The ALJ concluded in his Decision and Order:

> Since the uncontroverted evidence demonstrates that the scars found on "Quarterback Stock's" pasterns were fully healed and the horse was, therefore, "restored to satisfactory condition," as contemplated by the Department's statement accompanying the final rule implementing the "Scar Rule," "Quarterback Stock" was not "sore" on June 22, 1991, within the meaning of the Horse Protection Act or the regulations issued pursuant to the Act.

Appendix C, p. 76a. The ALJ concluded that the horse would not reasonably be expected to suffer physical pain or distress,

inflammation, or lameness when walking, trotting, or otherwise moving. The statements of the Department of Agriculture to which the ALJ referred are statements published in the Federal Register accompanying the final Scar Rule providing clarification of the Rule. Those statements included:

> Still another comment indicated that the concept of "once sore - always sore," should be eliminated . . . Additionally, it is conceivable that such a scarred horse could be restored to a satisfactory condition with proper care, rest and time. The Department therefore finds no justification to change the proposed scar rule or its intent.

44 Fed. Reg. 25176 (1979).

These statements manifest a clear legislative intent to allow a horse which was once sore to fully heal and not be considered sore. The legislative intent can be interpreted to mean that after proper care, rest and time, the area that was scarred could fully heal to a point where the existence of pain would be eliminated. It is this pain that the horse would experience while walking, cantering, running walk, or otherwise moving that adds to the unfair competitive advantage and inhumane acts to the horse.

The JO, however, interpreted the "once sore - always sore" statement to mean that after proper care, rest and time, it would be conceivable that a scarred horse would no longer have scars. The Sixth Circuit noted that the horse was not restored to satisfactory condition by looking to the plain meaning of the word "restore," as defined by Webster's Third International Dictionary. The Sixth Circuit concluded, the horse was not considered to be restored, "put back in an original state," since it still had no hair in the scarred area. These interpretations are clearly erroneous.

A. The Sixth Circuit's Affirmation of the Judicial Officer's Interpretation of the Act Was Error Since Such Interpretation Was Arbitrary, Capricious, or Manifestly Contrary to the Act.

Section 10 (e) of the Administrative Procedure Act allows a reviewing court to set aside any agency actions which are arbitrary, capricious, an abuse of discretion or unsupported by substantial evidence. *Consolo v. Federal Maritime Commission*, 383 U.S. 607 (1966). This Court has defined substantial evidence to include relevant evidence that should be enough to justify, in a trial by jury, a refusal of directed verdict when the conclusion to be drawn from the evidence is a question of fact. *Id.* at 620. *See also, National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939). The case at bar demonstrates that there is a lack of substantial evidence to support a finding of a violation of the Act. As stated above, there is a question of fact where the exact location of the scars were on "Quarterback Stock." There was testimony before the ALJ by two USDA veterinarians, the DQP, Dr. Harlan Pennington, D.V.M., from the Greenback Classic Horse Show and Dr. Michael Bricker, D.V.M. Four veterinarians testified to the same scars but all had variations of the exact location or size. The only consistency of all the veterinarians' testimony was the fact that there was no abnormal sensitivity in the forelimbs which routinely is indicative of a "sore" horse.

B. The Sixth Circuit Court of Appeals Erred by Allowing the Judicial Officer's Interpretation of the Scar Rule and Horse Protection Act to Stand.

There are two questions that a court must answer when reviewing an agency's construction of a statute which it administers. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). These questions are whether

or not Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter. This Court has held on numerous occasions that administrative constructions which are contrary to clear congressional intent must be rejected. *Id.* at 843, n.9. *See also, Young v. Community Nutrition Institute*, 476 U.S. 974 (1986); *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992). This Court, in determining the meaning of a statute, must take into consideration not only the statutory language, but also the design of the statute and its object and policy. *Crandon v. United States Boeing Company, Inc.*, 494 U.S. 152 (1990).

Congress, in passing the Federal Horse Protection Act and Scar Rule, has attempted to curb and ultimately end the inhumane practice of soring horses so as attain an unfair competitive advantage. The horse that is to be entered into competition shall not be "sore," implying that the horse shall be free from physical pain. It is this physical pain which causes the animal to exaggerate its high stepping gait, thus causing the unfair competitive edge. When there is a deliberate act of "soring" the horse's front feet, "the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, reproducing exactly [the characteristic high stepping gait]." H.R. Rep. No. 1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. It is this trait of the Tennessee Walking Horse that show judges and spectators look for in a champion.

Congress also took into consideration that a horse that was once sore, may be "restored to satisfactory condition." The comments recorded in the Federal Register, as addressed above, state that it is conceivable that a scarred horse could be restored to a satisfactory condition with proper care, rest and time. After such therapeutic measures (care, rest and time) the horse could

become free from the pain that would exaggerate its high stepping gait causing the unfair advantage. The Sixth Circuit became caught up in the fact that the scars on "Quarterback Stock" were hairless and thus not "restored" as defined by Webster's Third International Dictionary. *Rowland v. United States Department of Agriculture*, 43 F.3d 1112 (1995). The Sixth Circuit stated:

> Moreover, the plain meaning of the term "restore" contradicts the conclusion drawn by the ALJ. The word defined in Webster's Third International Dictionary, means "to put back in an original state." Quarterback Stock still had no hair in its pastern areas. Therefore, the horse was not restored.

Rowland, 43 F.3d at 1116.

This Court construes a word in accord with its ordinary meaning if it is not specifically defined by the statute. *Smith v. United States*, __ U.S. __, 113 S. Ct. 2050 (1993). The ordinary meaning of the word "restore" leaves the statute open to interpretation. As stated above, the definition of "restored" relied on by the Sixth Circuit was "to put back in an original state." The definition that the Sixth Circuit relies on is one of six or more definitions laid out in Webster's Third International Dictionary. Another equally plausible definition is "to bring back to a healthy state: cause to recover." Webster's Third New International Dictionary (1993). This Court has noted that the existence of alternative dictionary definitions which each make sense under the statute, indicates that the statute is open to interpretation. *National Railroad Passenger Corp. v. Boston and Maine Corp.*, 503 U.S. 407 (1992). *See also, Sullivan v. Everhart*, 494 U.S. 83 (1990). Reading the statute in light of all its provisions and the comments and interpretations of other Circuit Courts, it can

easily be ascertained that Congress intended a restoration of a physical nature, not merely *cosmetic*.

The Scar Rule presumes "soreness" with the presence of scars in the horses pastern areas. However, these scars must contribute to the physical pain that has been discussed at length above. The USDA veterinarians, as well as Petitioners' veterinarians, palpated the horse and discovered no abnormal sensitivity. Also, the scars were considered to be fully healed. For all intents and purposes, the horse was "restored" to a satisfactory condition.

There is no provision in the statute to consider scars caused by therapeutic surgery or even accidental injury.[7] The Rule does point to the fact that the elements must be present on the occasion that the horse was being shown or exhibited.

Common sense demonstrates that scars do not disappear.[8] Once flesh is scarred, it will not be "restored" to its original appearance as the Sixth Circuit concluded in rendering its judgment. The fully healed, hairless scars were contemplated by Congress in the passing of the Act. "Once sore - always sore" has been eliminated. A horse free from the pain contemplated by the Act would not be in violation of the Act.

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7. The Petitioners testified before the ALJ that the scars were present on "Quarterback Stock" at the time they purchased the animal. The scarring was caused by a fall which the animal endured while being loaded onto a horse trailer before Petitioners owned it.

8. Scars have been used for many years as identifying marks in the criminal justice system. Even with the advances of plastic surgery, one would find it highly unlikely to have that type of surgery done on the animal's scars.

IV.

IT WAS ERROR FOR THE COURT TO DETERMINE THAT PETITIONERS' HORSE WAS SORE AT THE TIME OF ITS ENTRY INTO THE GREENBACK CLASSIC IN ACCORDANCE WITH THE SCAR RULE AND THE HORSE PROTECTION ACT.

In light of the discussion above, "Quarterback Stock" could not have been determined to be "sore" pursuant to the Scar Rule and the Act. There is a question of fact whether "Quarterback Stock" had scars on its pasterns as the Act requires to demonstrate before a violation can be determined. Even if the discrepancy of the location of the scars is not persuasive, this Honorable Court should determine that the present interpretation of the Scar Rule by the Sixth Circuit is in error.

"Quarterback Stock" was fully "restored" to a satisfactory condition as contemplated by the Act. There may have been scars on the animal, however, they were fully healed and it was not experiencing any pain during movement. "Quarterback Stock" is a World Champion Tennessee Walking Horse. This horse has competed in over twenty shows and events without any question of its compliance with the Act. Only proper skill and training have contributed to the success of the horse.

"Quarterback Stock" had scars on its fetlock area which were fully healed, though they may have been hairless. There was no sensitivity of the scars as exhibited by repeated palpation of the area by the USDA veterinarians. In light of the intent of congress, there can only be one determination. This determination is that "Quarterback Stock" was not sore in accordance with the Scar Rule and the Act. For all the above reasons, inclusive, "Quarterback Stock" was not "sore" as contemplated by the Act.

CONCLUSION

This is a case of first impression for this Honorable Supreme Court of the United States of America. The twenty-year old Horse Protection Act has yet to be interpreted by this Court. In light of the inconsistencies among the Circuits, the time has come for this Court to utilize its supervisory powers. The Tennessee Walking Horse industry is a multi-million dollar industry. The citizens who participate as breeders, trainers, exhibitors or just as "fans," number in the millions. The livelihood of many of these citizens is being denied by misinterpretation of the statute as well as arbitrary rules and actions of the USDA without due process of law.

Petitioners have been denied enjoyment and use of their property without due process of the law. They have also been the subject of punishment due to the confusion of the courts in interpreting the proper procedure and application of the statutes and rules which most affect their ability to utilize their horses.

Petitioners, therefore, respectfully request that a Writ of Certiorari issue so that this Honorable Court may once and for all clarify the confusion and mend the inconsistencies that will continue without its supervisory power.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JANUARY 13, 1995

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0437P (6th Cir.)
File Name: 94a0437p.06

No. 93-4033

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

F. DALE ROWLAND; DENISE ROWLAND,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRIGULTURE,

Respondent.

Decided and Filed January 13, 1995

ON PETITION for Review of an Order of the Secretary, United States Department of Agriculture

Before: NELSON, SUHRHEINRICH, and SILER, Circuit Judges.

SUHRHEINRICH, Circuit Judge. F. Dale Rowland and Denise Rowland seek review of a final order of the Secretary,

Appendix A

United States Department of Agriculture (USDA), which held that they violated the Horse Protection Act, 15 U.S.C. § 1825, because they owned and Denise Rowland entered a "sore" horse in the Greenback Classic Horse Show in Randolph, Ohio, on June 22, 1991.

We hold that the factual findings are not clearly erroneous, and that the Secretary's interpretation of the pertinent regulation promulgated under the Act is neither arbitrary nor capricious. Therefore, we **DENY** the petition for review of the Secretary's order.

I.

The relevant facts in this case arose after "Quarterback Stock," a champion Tennessee Walking Horse, was entered in the Greenback Classic Horse Show. Before the horse was admitted into the exhibition ring, the Designated Qualified Person ("DQP"), inspected the horse to detect whether it had been sored. Soring occurs when an injury to or sensitization of a horse's legs, rather than training and breeding, is used to induce the high stepping gait for which Tennessee Walkers are known. *Thorton v. United States Dep't of Agric.*, 715 F.2d 1508, 1510 (11th Cir. 1983). The DQP is hired by show management to inspect horses because management is potentially liable if a sore horse is allowed to participate and a DQP is not utilized. 15 U.S.C. § 1824(3); 9 C.F.R. § 11.7; *Elliott v. Administrator, Animal & Plant Health Inspection Serv.*, 990 F.2d 140, 142 n.4 (4th Cir.), *cert. denied*, 114 S. Ct. 191 (1993). The DQP passed the horse.

Here, however, prior to showing, two USDA veterinarians, posted to monitor compliance with the statute, observed the horse and disagreed with the DQP's assessment. Dr. Gwen Lee

discovered "obvious scarring-front fetlock" on Quarterback Stock. The second USDA veterinarian inspected the horse and likewise described the horse as "scarred on the front fetlocks." Consequently, the two USDA veterinarians concluded that the horse was "sore" within the meaning of the Scar Rule. 9 C.F.R. § 11.3.

The Administrator of the Animal and Plant Health Inspection Service, the division of the USDA charged with enforcing the Horse Protection Act, issued a complaint against the Rowlands. After a disciplinary administrative proceeding under the Act, an administrative law judge ("ALJ") dismissed the complaint. The ALJ found that the horse "had bilateral scars indicative of soring" which were encompassed within the prohibitions contained in the Scar Rule; however, he held that because the scars "were as fully healed as possible," the horse was "restored to satisfactory condition" and not subject to the Act.

The government appealed to the Judicial Officer ("JO"), who serves as the delegate of the Secretary of Agriculture for judicial matters, 7 C.F.R. § 2.35, and has final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556, 557. The JO affirmed the ALJ's factual findings, but disagreed with his interpretation of the Scar Rule. Therefore, the JO reversed the order of dismissal, assessed a civil penalty of $2,000 and disqualified the Rowlands "for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale or auction." The decision of the JO became the final decision of the Secretary.

Appendix A

II.

The Horse Protection Act states that the Secretary's findings will be set aside only if "unsupported by substantial evidence." 15 U.S.C. § 1825(b)(2). When "an administrative agency disagrees with the conclusions of its ALJ, the standard does not change; the ALJ's findings are simply part of the record to be weighed against other evidence supporting the agency." *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1486 (9th Cir. 1984) (citing *Saavedra v. Donovan*, 700 F.2d 496, 498 (9th Cir. 1983)). More weight is given to the ALJ's findings when the issue of credibility is based on witness demeanor. *Id.* We defer to the agency and not the ALJ, however, in the matter of derivative inferences. *Id.*

If substantial evidence supports the Secretary's decision and the proper legal standards were employed, we must affirm his decision. *Fleming v. United States Dep't of Agric.*, 713 F.2d 179, 188 (6th Cir. 1983).

III.

Section 1824(2) prohibits showing a "sore" horse.[1] To establish a violation by the Rowlands, the government bore the burden of showing by a preponderance of the evidence, that the

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1. The term "sore" when used to describe a horse means that—(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse, (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse, (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving.... 15 U.S.C. § 1821(3).

Rowlands owned Quarterback Stock, that the horse had been entered in a show, that the horse was sore at the time of entry, and that the Rowlands allowed the entry. *See Baird v. United States Dep't of Agric.*, 39 F.3d 131, 137 (6th Cir. 1994) (addressing the meaning of the term "allow"). The only element in question is whether the horse was sore at the time of its entry into the Greenback Classic.

The Rowlands challenge the finding that the horse was sore within the meaning of the Act, contesting the factual findings and the interpretation of the regulation upon which the violation turns. That regulation, known as the Scar Rule, was promulgated pursuant to Section 9 of the Act which authorizes the Secretary to "issue such rules and regulations as he deems necessary to carry out the provisions of this chapter." 15 U.S.C. § 1828.

The Scar Rule, which applies to all horses born after October 1975, provides in part, that to show a horse, "[t]he anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair." 9 C.F.R. § 11.3 (footnote omitted). Under the rule, any horse that does not meet the criteria is deemed "sore" under the Act.

A.

Rowlands contend that the record evidence fails to support the existence of soreness because the scars on Quarterback Stock were not located in the horse's pasterns, that area above the coronary band and below the fetlock joint. We disagree.

Although the testimony regarding the precise size, shape,

appearance and location of the scars varied, there was sufficient evidence to support the finding that scarring was present in the pastern area. Both USDA veterinarians' notes referred to bilateral raised hairless scars in the fetlocks; however, both adequately explained the meaning of their notes. Those explanations indicated that the scarring occurred in the pastern area, thus implicating the Act. Dr. Lee testified that her notes meant that the soreness was "at the top of the pastern joint . . . towards the fetlock area." Dr. Binkley testified that her notes referred to the fetlocks to "remind [her] these [scars] were slightly unusual, they were near the fetlocks, because they were slightly different than some other ones that [she] would normally see."

The ALJ credited the testimony of the veterinarians as did the JO, commenting on the brief time lapse between the examination and the documentation and the consistency of findings by the two veterinarians. We are obliged to give weight to the ALJ's findings regarding credibility of witnesses. Hence, these findings are not clearly erroneous, and petitioners do not prevail on this argument.

B.

After the ALJ made his finding regarding soring, he noted that the "scars were fully healed" on the entry date. There is no dispute that the horse exhibited no sensitivity to palpation despite the existence of sufficient evidence establishing that the scars were caused by soring. Both USDA veterinarians testified that the scars were caused, in all likelihood, by "chronic insult" to the skin, because the raised scars they detected indicate a "healing defense" to a repeated injury as opposed to a one-time accident.

Nevertheless, after the ALJ found that the scars were healed,

he concluded that the Scar Rule did not prohibit entry of Quarterback Stock into the show because the horse was "restored to a satisfactory condition" as contemplated by the USDA. In reaching this conclusion, the ALJ relied on statements published in the Federal Register in response to comments sent to the USDA following the proposal of the regulation. The USDA's response to a comment criticizing and calling for the elimination of the Scar Rule's "once sore always sore" presumption, first noted that the scar rule applies only to horses trained after the prohibitions contained in the Horse Protection Act of 1970 became law; thus, the horses encompassed by the rule should be scar free. 44 Fed. Reg. 25176 (1979). Additionally, the USDA stated that it was conceivable that "a scarred horse could be restored to a satisfactory condition with proper care, rest, and time." *Id.*

The JO disagreed with the ALJ's conclusion that *no* violation existed at the time of entry because Quarterback Stock's scars had been healed. The JO relied on the unambiguous language of the rule itself to reach his conclusion. The Scar Rule plainly states that "all" horses that fail to meet the criteria shall be considered "sore."[2] The rule explicitly requires the pasterns of a horse be free from "bilateral evidence of abuse . . . including . . . *excessive loss of hair.*" 9 C.R.F. § 11.3 (emphasis added). Accordingly, the JO reasoned that there is no leeway for the ALJ's interpretation that *not all* horses that fail to meet the criteria are to be considered "sore." We agree.

Even if we were to consider the rule in light of the USDA's comments during promulgation, there is no basis upon which the Secretary's decision could be considered "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v.*

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2. The propriety of the presumption created by the Scar Rule is not argued on appeal.

Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984) (standard of review of agency interpretation of its rules and regulations). The JO interpreted the statement that "a scarred horse could be restored to a satisfactory condition with proper care, rest, and time" to mean that it is conceivable that a scar that initially failed to meet the criteria listed in the Scar Rule no longer failed to meet the criteria. We find this interpretation to be reasonable.

Moreover, the plain meaning of the term "restore" contradicts the conclusion drawn by the ALJ. The word, as defined in Webster's Third International Dictionary, means "to put back in an original state." Quarterback Stock still had no hair in its pastern areas. Therefore, the horse was not restored.

Finally, we note that the Act prohibits soring not only to prevent pain to the animals, but also to prevent owners who allow trainers to sore their horses from gaining an unfair competitive advantage over trainers who relied on skill and patience. *Elliott*, 990 F.2d at 144. If we allow scarred horses to compete because they are no longer in pain, we eventually reward trainers who sore their horses. This result ignores the dual purpose for which Congress enacted this law. Both the language of the Scar Rule and the purpose for which the horse protection law was passed support our finding that the JO's interpretation of the Act is neither arbitrary nor capricious.

Because we hold that substantial evidence supported the finding that Quarterback Stock was sore as defined by the Scar Rule at the time of entry in the Greenback Classic and that the JO's interpretation of the Scar Rule is not contrary to the statute, the Rowland's petition for review is **DENIED**.

APPENDIX B — DECISION AND ORDER OF UNITED STATES DEPARTMENT OF AGRICULTURE DATED AUGUST 25, 1993

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IIPA Docket No. 92-5

In re:

F. Dale Rowland and Denise Rowland,

Respondents

Decision and Order

This is a disciplinary administrative proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. § 1821 *et seq.*). On December 4, 1992, Administrative Law Judge Edwin S. Bernstein (ALJ) filed an Initial Decision and Order in which he dismissed the Complaint which alleged that Respondents, as co-owners of a horse known "Quarterback Stock," entered and allowed the entry, for the purpose of showing or exhibiting, the horse at a horse show while the horse was sore. The ALJ found that the horse "had bilateral scars indicative of soring" (Initial Decision at 19), and that "[t]he Scar Rule's prohibition of 'bilateral evidence of abuse, which is indicative of soring,' clearly encompasses 'Quarterback Stock's' scar" (Initial Decision at 17). Nevertheless, the ALJ held that, because the scars "were as fully healed as possible," the horse "was 'restored to a satisfactory condition,' as contemplated by the Department in the final rule" (Initial Decision at 19).

On January 22, 1993, Complainant appealed to the Judicial Officer, to whom final administrative authority to decide the

Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).* On March 9, 1993, the case referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this case, the Initial Decision and Order is reversed, and Respondents are assessed a civil penalty of $2,000 and disqualified for 1 year from showing, exhibiting, or entering any horse, and from judging, managing, or otherwise participating in any horse show. However, those portions of the ALJ's Initial Decision with which I agree are set forth below, with additions shown by brackets, deletions shown by dots, and with trivial editorial changes not specified. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

This is a disciplinary administrative proceeding under the Horse Protection Act ("the Act"), as amended, 15 U.S.C. § 1821 *et seq.*, and the regulations issued pursuant to the Act, 9 C.F.R. §§ 11.1-11.41 ("the Regulations"). This proceeding was instituted by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), on December 6, 1991. The

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* The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1280 (1988). The Department's present Judicial Officer was appointed in January 1971, having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program).

Appendix B

Complaint alleged that Respondents, Denise Rowland and F. Dale Rowland, entered and allowed the entry of a horse for showing while the horse was sore, in violation of the Act at 15 U.S.C. § 1824(2). The Administrator seeks the imposition of civil penalties and the disqualification of Respondents from significant participation in the horse industry as provided under section 6(c) of the Act, 15 U.S.C. § 1825(c). Respondents filed a timely Answer on January 6, 1992, and an Amended Answer (hereinafter referred to as "the Answer") on January 21, 1992, in which they denied the material allegations of the Complaint.

I presided over a hearing on August 4 and 5, 1992, in Cleveland, Ohio. Complainant was represented by Robert Ertman, Esq., of the Office of the General Counsel, U.S. Department of Agriculture. Respondents were represented by David N. Patterson, Esq. The parties filed proposed findings of fact, proposed conclusions of law and briefs on November 2, 1992. All proposed findings, proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Statute and Regulations

The following statutory provisions are applicable:

> As used in this chapter unless the content otherwise requires:
>
> . . . .
>
> (3) The term "sore" when used to describe a horse means that —

Appendix B

. . . .

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse *suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving,* except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which treatment was given.[1]

. . . .

The following conduct is prohibited [by section 5 of the Act]:

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling auctioning, or offering for sale, in any

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1. 15 U.S.C. § 1821(3)(D). (Emphasis added.)

horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.[2]

. . . .

(d)(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.[3]

. . . .

(b)(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. . . .[4]

. . . .

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who . . . (a) . . . paid a civil penalty assessed under subsection (b) [of this section

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2. 15 U.S.C. § 1824(2).

3. 15 U.S.C. § 1825(d)(5).

4. 15 U.S.C. § 1825(b)(1).

> or is subject to a final order under such subsection assessing a civil penalty] for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation [and not less than five years for any subsequent violation]. . . .[5]

All horses born on or after October 1, 1975, are subject to the "Scar Rule," 9 C.F.R. § 11.3(a), which provides:

> The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas,[5] other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

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5. "Granuloma" is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents.

Findings of Fact

1. Respondents F. Dale Rowland and Denise Rowland are

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5. 15 U.S.C. § 1825(c).

individuals whose mailing address is 9362 Read Road, Cambridge, Ohio 43725. (Answer, ¶ I A)

2. At all times relevant, F. Dale Rowland and Denise Rowland jointly owned the horse known as "Quarterback Stock," (CX 1; Tr. 11), and F. Dale Rowland was the trainer of "Quarterback Stock." (CX 1, 5-7)

3. Denise Rowland entered "Quarterback Stock" as entry number 522, Class 14, on June 22, 1991, at the Greenback Classic Horse Show at Randolph, Ohio (CX 1, 5-7, Tr. 390) [, and F. Dale Rowland allowed such entry].

4. On June 22, 1991, "Quarterback Stock" was a twelve-year-old horse, born after October 1, 1975, and was therefore subject to the Scar Rule. (9 C.F.R. § 11.3; CX 1, 5)

5. Designated Qualified Person ("DQP") Harold Pennington inspected "Quarterback Stock" for compliance with the Act on the day of the Greenback Classic and passed the horse for participation in the show. (CX 2-4)

6. USDA veterinarian, Gwen Lee, D.V.M., attended the Greenback Classic to examine horses for compliance with the Act. Dr. Lee attended a week-long Departmental training course in determining compliance with the Act in February 1991. (Tr. 71-72). Dr. Lee testified that she remembered examining Respondents' horse because:

> Ms. Rowland got quite upset and she got very angry and she started yelling . . . . [S]he told us she was going to sue us and then about a month later, we were named in a lawsuit for three-quarters of a million dollars. (Tr. 72)

Appendix B

. . . .

> . . . [I]t was obviously such a big deal, you know, that Ms. Rowland got very upset and the lawsuit came out and it's something that is sort of burned in my memory, because it was obvious that it was going to be a very important event. (Tr. 107)

The Greenback Classic was the only show at which Dr. Lee examined horses for compliance with the Act. (Tr. 71)

7. Dr. Lee found that "Quarterback Stock" had bilateral scars on the anterior pasterns of his forelegs and she, therefore, found him to be out of compliance with the Act based upon the "Scar Rule," 9 C.F.R. § 11.3(a). (CX 1 and 2; Tr. 72-73) She described the horse's bilateral scars as being at two areas. These were scars at the high end of the long pastern bone on each leg, approximately the size of quarters, and smaller scars, approximately the size of nickels, on each leg, at the mid-range of the long pastern bone. (CX 1; Tr. 73, 81-82) Dr. Lee judged the scars to be at approximately the same height on each leg, below the fetlock joint. (CX 1, 8A; Tr. 98, 121). On the back of the Summary of Alleged Violation form, Dr. Lee noted, "Bilateral scarring — obvious — front fetlocks." (CX 1) She explained the term "fetlock":

> [W]hen I said that the scarring was obvious front fetlocks, I meant that it was up towards the fetlock joint, but it was clearly, in my mind, over the pastern joint — over the pastern bone, which is where it's illegal to have scarring, according to the regulations. (Tr. 98)

Dr. Lee described the scars as "raised whitish-pink focal areas of granulation tissue, with no hair," which were raised about a quarter of an inch. (Tr. 90) As to the likely cause of the scars, she testified:

> If it's an abrasion, you don't really expect to get that raised granulation tissue. It's more of a flatter healing that's formed, it's not the raised tissue.
>
> . . . .
>
> . . . That indicates more of a chronic insult to the skin. . . .

(Tr. 96) Dr. Lee testified that chains could reach the area of the scars. (Tr. 135) However, she found that the horse had no sensitivity to palpation. (CX 1, 2; Tr. 97, 142)

8. Miava Binkley, D.V.M., an experienced USDA veterinarian, also examined "Quarterback Stock" on June 22, 1991. (CX 1, 3; Tr. 157) She also remembered examining the horse because of the following event:

> I had to go over to Ms. Rowland and tell her the horse — we found the horse to be sore because it was scarred, at which point she became very very upset, very very agitated.
>
> . . . [S]he began yelling and screaming, threatening us, threatening to sue us. . . . [S]he had a small crowd of people started to gather and watch the commotion, so I remember it very well. (Tr. 157-158)

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Only one horse was found to be sore at the Greenback show, the last show at which Dr. Binkley examined horses for compliance with the Act. (Tr. 174, 223) "Quarterback Stock" was the only horse that Dr. Binkley found to be sore during the 1991 show season. (Tr. 175)

Dr. Binkley concurred with Dr. Lee that the horse was sore based upon the Scar Rule. (CX 1, 2, 3; Tr. 157-158) Dr. Binkley testified that the scars on the upper area of the pasterns of each leg, just below the fetlock, were about an inch in diameter, pinkish, raised and rounded. (Tr. 158-159) Dr. Binkley also reported smaller, bilateral scars lower on the pastern. (CX 1, and 3; Tr. 158) On the back of the Summary of Alleged Violation form, Dr. Binkley noted, "horse scarred, front fetlocks (low on fetlocks)." (CX 1)

In response to questions regarding the meaning of the terms "pastern" and "fetlock," Dr. Binkley agreed with the definition of "pastern" contained in the Illustrated Veterinarian's Encyclopedia for Horsemen as "the area between the fetlock joint and the coronary band." (Tr. 163) She further testified:

> Q. Doctor, if somebody puts the emphasis in the definition of fetlock on the *area of the joint,* does this keep the pastern from running all the way up to the fetlock joint itself?
>
> A. No. I think there's some area of overlap between the two. The pastern and the fetlock are general horsemen's terms of areas of a horse's confirmation. The pastern derives its name because the pastern area that

> horsemen refer to lies directly over the pastern bones, which there are two, the longpastern bone and short pastern bone. (Tr. 163) (emphasis added)
>
> She explained her use of the term "fetlock" in her notes as follows:
>
> > Fetlock, a lot of horsemen use that term fairly loosely to refer to the joint or the area around the joint, much as I did in my little notes to myself, it's a very general loose term. However, the long pastern bone does extend all the way to the fetlock joint, that's made up of the long pastern bone and the cannon bone. So to me, there is some overlap in those two terms. (Tr. 164)

With respect to the cause of the scars on "Quarterback Stock," Dr. Binkley testified:

> > An abrasion, typically, if it's a one time occurrence, a horse might fall or scrape itself . . . that would typically tend to heal with a flat-type of scar. . . .
> >
> > . . . .
> >
> > . . . The scars that I saw were rounded and rather raised, which is something you typically don't see on a one-time injury-type scar.

> Usually, if you've got a raised scar, that means the body put up a profilifitive (sic) wound healing defense against an injury that's happened more than once . . . . So that would account for the raised nature of this scar that probably it happened on some kind of chronic insult of injury to that area of the foot. (Tr. 165-166)

9. When advised of the veterinarians' finding that "Quarterback Stock" was in violation of the Scar Rule, DQP Pennington declined to reverse his earlier decision and issue a ticket excluding the horse from competition as sore. (CX 3; Tr. 187) In a statement given to USDA inspector Don Castner on the day of the show, Mr. Pennington indicated that his decision not to issue a ticket excluding Respondents' horse from competition was based upon his opinion that the scars on the horse's left foot were above the "chain pattern." (CX 3)

10. Mr. Pennington testified that he found it hard to remember since it had "been a while" since he had examined the horse, but to the best of his knowledge "Quarterback Stock" has "hair loss on one foot," and "two or three small places that are above the ankle that are round and flat." (Tr. 218) Mr. Pennington expressed the opinion that the horse "has enough hair loss and enough raise that you would call him out in the left foot." (Tr. 248-249) He believed that the remaining two or three marks at issue were not chain scars. (Tr. 249) He stated that "to be a scar they have to be raised, they have to be granulated," rather than the slick areas which were pink and soft and not granulated. (Tr. 250)

With regard to the "chain pattern," Mr. Pennington first testified:

> I told her [the veterinarian] if the chains came up that high and they went down over the coronet band and you had a real problem. (Tr. 219) [Brackets by ALJ]
>
> Some of his additional testimony was ambiguous:
>
> Q. Okay, If it [the chain] doesn't go down as far as the coronet band, then it wouldn't go up as far as the fetlock?
>
> A. It won't go up *above the ankle.*
>
> Q. Okay. Did you ever see one that went *above the fetlock?*
>
> A. No, not really, no (Tr. 221) (emphasis added)

11. Denise Rowland testified that when she purchased "Quarterback Stock," the horse had the same marks that he bore on June 22, 1991 (Tr. 259, 265), which she described as "smooth hairless spots on his feet," that "aren't technically scars." (Tr. 259-260) She later added that, "it's hair follicle damage — which means the hair will never grow on that spot." (Tr. 262) As to the size of the scars, Ms. Rowland stated, "the biggest one is about the size of my fingernail, my small fingernail." She testified that "three of them are perfectly flat," and "on the left foot is the only raised one he has . . . ," (Tr. 262-263), which is raised "about a quarter of an inch." (Tr. 268) Ms. Rowland testified that the scars were located "on the fetlock," (Tr. 267), higher, more to the outside of the leg, and less round than the USDA veterinarians

depicted them on the Summary of Alleged Violation form. (CX 1; Tr. 289) She testified that the veterinarians had depicted scars which were not present on the horse's feet. (Tr. 290)

Ms. Rowland described the shape of the scars variously. First she stated, "One is 'y' shaped, one is kind of irregular shaped — and two are spots." (Tr. 261) Later, she described the outside right scar as a "long, narrow scar." (Tr. 267) Ms. Rowland indicated the shape and location of the scars on a diagram depicting four marks in a row across the anterior pasterns of the horse's forelegs, at approximately the same height, two on each leg, beneath the widest part of the rounded area at the top of the diagram which represents the first joint above the hoof. (CX 19)

Ms. Rowland responded "no" when asked if a chain goes "in the area where those marks are?" She explained.

> You're going to have to have one half inch above the coronary band so that when you pull the chain forward it cannot hit, okay? And it's only going to go up into this area here because it doesn't have room to go back and forth. (Tr. 268)

She testified that the previous owner told her that "Quarterback Stock's" scars were caused by a fall on concrete and wrap injuries, when the horse's legs were wrapped after the fall. (Tr. 307)

12. F. Dale Rowland testified that "Quarterback Stock" had "small places, hairless places, on his fetlock area," when Respondents purchased the horse, (Tr. 391), "two on each fetlock," which he described as "smooth bald spots." (Tr. 393) He

stated that they've "never changed" since they bought the horse. (Tr. 392) He described the scars as "about the size of my thumb, little fingernail," and stated that "[t]his one here on the left front outside is raised slightly." (Tr. 404) He added, "[t]his is the one that may possibly go into the pastern area slightly." (Tr. 404) He described the shape of the raised scar by saying "it runs in an angle." He described the other scars as follows: "this one on the outside is sort of circular on the right foot and this one on the left foot on the outside. This one is kind of like a 'v' shaped on the inside of the right." (Tr. 405) He expressed the opinion that no scars were in the chain pattern and denied that there were more than four scars. (Tr. 406, 411) In response to questioning about the cause of the scars, Mr. Rowland testified that the previous owner "said he fell on concrete or asphalt or something to that effect." (Tr. 392) He depicted the scars on a diagram of horse's legs as four marks aligned at approximately the same height, lower than the marks depicted by Denise Rowland and higher than the marks made by Dr. Bricker. (RX 22; Tr. 393)

13. Respondents' veterinarian, Michael Bricker, D.V.M., testified that he has an interest in equine medicine and surgery (Tr. 323) and seventy-five percent of his work is with equines. (Tr. 344) Dr. Bricker stated that he has been treating Respondents' horses for about 25 months, (Tr. 324), and that he examined "Quarterback Stock" on June 24, 1991. (Tr. 331) He described the horse's scars as follows:

> I saw some hairless areas that — that I feel is more on the fetlock area than on the pastern area. Minor hairless area — there's one area on the left front that is probably — starts at the fetlock and goes down into the pastern. That one is slightly raised. The other ones are just hairless areas that aren't raised. (Tr. 331-332)

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Bricker described the shape of the scars as follows:

> There's one that's — that I would consider a linear line. That was a left front leg on the anterior lateral surface. That is a — that is a line. The other mark on the left front is a circular area. The one on the right front, if I think — if I recall, you get down and you spread the hairs. It kind of makes a "y" shape . . . on the right front anterior medical surface and on the outside it's — it's more of a — I don't want to say a line. It was more of a circular type area then, too. [(Tr. 337)]

In response to my questioning, Dr. Bricker gave the following testimony which is somewhat inconsistent with the preceding description:

> Q. With respect to the marks that were circular in shape, comparing them to coins, pennies, nickels, quarters, what size would you compare them to?
>
> A. Probably in between a nickel and a dime.
>
> Q. For all *three marks that are circular*?
>
> A. Right. (Tr. 337) (emphasis added)

With regard to the one raised scar, the witness stated that it had "possibly an eighth of an inch raise." (Tr. 338) Dr. Bricker did

not recall seeing more than two scars on either leg. (Tr. 355-356) He did not record his observations of the scars on June 24, 1991. (Tr. 363)

In testimony with regard to definitions of the "fetlock area" and "pastern," Dr. Bricker introduced a diagram of a horse which identified the fetlock joint as in the center of the first round ball above the hoof, also identified as "ankle." (RX 21) He concurred with the depiction of pastern area which Mr. Pennington had drawn on a diagram (CX 10-C), as extending downward from midway on the long pastern bone to midway on the shorter bone below. (Tr. 351) Dr. Bricker also stated that he agreed with the definition of "pastern" in the Illustrated Veterinarian's Encyclopedia for Horsemen, as "the area between the fetlock joint and the coronary band." (Tr. 361) He stated:

> Now if you want to get technical yes, the fetlock is that joint and I cannot clinically go out and look at a horse and point to that — the line going from the cannon bone to the pastern bone, so I'd say it's the, you know, the round surface that you see above the — above the hoof. (Tr. 368)

Dr. Bricker described the depiction of scars by the Department's veterinarians (CX 1) as "mid-region of the pastern area" (Tr. 352), and stated that they were "marked a *little bit low.*" (Tr. 353) (emphasis added) He depicted the scars on an identical diagram as four marks aligned, two on each of the horse's forelegs, at approximately the same height, slightly above the narrowest part of the leg, lower than the height depicted by both Respondents. (CX 19, 20, 22)

With respect to the cause of the scars, Dr. Bricker testified that he "would not want to venture to say," but stated, "I have seen sores — scars from soring and the ones that I have seen are usually lower on the leg and the ones that I've seen have been linear." (Tr. 343)

14. Dr. Bricker described "Quarterback Stock's" scars as "healed as much as possible." He said, "I mean, it's causing the animal no problem and they're cool. In other words, they're not warm to the touch and that's as good as they're going to get." (Tr. 344) In response to questions, Dr. Bricker added:

> If they're warm, warmth tells you inflammation, there's still some healing processes going on or some kind of inflammatory process going on and these are — like I said, these are — to me they look like old wounds and they've been there awhile and they are definitely cool to the touch and they — they're as good as we're going to get.
>
> . . . .
>
> . . . [E]very [sic] since I've been doing their work I've never had to treat the lower leg. (Tr. 345)

He responded, "yes" when asked if the marks were unchanged over the period that he had examined the horse. (Tr. 359) In response to questioning about the relative ease of healing a horse's lower leg injury, Dr. Bricker testified:

> It's just much harder to get a lower leg injury to heal.

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. . . .

> . . . It's mostly due to the movement, what they call mic — micromovement of that area. [(Tr. 342)]

He also stated that, "[e]very time an animal moves you just get a little bit of movement, irritates the area" (Tr. 342). He stated that the horse had feeling but not increased sensitivity at the scars. (Tr. 366)

15. The area of a horse, referred to in the Scar Rule, 9 C.F.R. § 11.3(a), as the "pastern," is the area above the coronary band and below the fetlock joint — the joint of the long pastern bone and the cannon bone. (Tr. 163, 361-362)

16. One June 22, 1991, "Quarterback Stock" had bilateral raised, hairless scars of approximately the same type, at the same location on the anterior pasterns of its forelegs, which are indicative of soring.

17. The scars on "Quarterback Stock" have remained unchanged from the time that Respondents purchased the horse until the present time, including June 22, 1991. (Tr. 218, 247, 275)

18. "Quarterback Stock" was examined by USDA veterinarians after competing in horse shows on May 17, 1991 (RX 23), and on October 4 and 5, 1991, when he was photographed after competition wearing chains. (RX 12, 23; Tr. 277, 283) He was inspected by DQPs on April 19-20, April 27, May 17, May 25, June 14-15, July 3-6, July 12-13, July 27 and October 4-5, 1991. He also underwent post-show inspections on May 17 and May 25, 1991. (RX 23) Dr. Binkley examined

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"Quarterback Stock" in 1989 after he won the competition at the Ohio Celebration. (RX 7; Tr. 274-276) During none of these inspections was "Quarterback Stock" found to be sore.

. . . .

Discussion

Although the testimony is conflicting as to the precise size, shape, appearance and location of the scars on "Quarterback Stock," the preponderance of credible evidence supports Complainant's contention that the animal bore bilateral scars, of approximately the same size, degree and location on the anterior pasterns of its forelegs. As stated by the Department in the Federal Register, 43 Fed. Reg. 18,519 (1978), when the Scar Rule was proposed, such bilateral scars of approximately the same degree, at approximately the same location, are not likely the result of an accident, and are indicative of "soring." This conclusion is particularly warranted, where, as here, multiple scars appear at the same relative positions on each foot.

With regard to the description of the scars, I find more persuasive the precise and consistent descriptions of the two USDA veterinarians. Dr. Lee's and Dr. Binkley's credibility were enhanced by the fact that their concurring statements were recorded shortly after they examined the horse and their testimony was based upon their memory of the events.

The descriptions by Respondents' witnesses were less precise and less consistent with each other. Denise Rowland, DQP Pennington and Dr. Bricker were somewhat inconsistent in their own positions. In addition, Dr. Bricker's testimony is less reliable because he did not record his observations at the time of his examination, as did Drs. Lee and Binkley.

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Mr. Pennington's decision on the day of the show not to write a ticket for "Quarterback Stock" was based upon his belief that the scars on the left foot were above the "chain pattern." He did not contend at that time, as he did later, that the "marks" were not scars of the type prohibited by the regulation. When he testified as to the appearance and location of the scars, he began by acknowledging that it was "hard to remember," since it had "been a while" since he examined the horse. While he believed that the horse was out of compliance on one foot, he testified that the remaining two or three marks, about which he disagreed with the Department's veterinarians, were flat, not granulated, and not chain scars.

Although Mr. Pennington and the other witnesses for Respondents emphasized their disagreement over these characteristics, none is specifically required under the rule. Scars need not be shown to be raised, granulated or caused by chains. While the rule refers to "granuloma" this term is defined as "a focal *lesion* formed as a result of inflammatory reactions caused by biological, chemical or *physical* agents." 9 C.F.R. § 11.3(a) n.5 (emphasis added) Although the term "lesion" is not explained in the rule, the International Dictionary of Medicine and Biology,[6] volume II, of which official notice is taken, defines "lesion" at page 1565 as "a pathological *alteration in the structure* or function of a tissue or organ." (emphasis added) In fact, Respondents offer no basis for their contention that the scars are not of the type and severity prohibited by the Scar Rule. (Brief for Respondents at 15) The Scar Rule's prohibition of "bilateral evidence of abuse, which is indicative of soring," clearly encompasses "Quarterback Stock's" scars.

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6. John Wiley & Sons, New York, 1986.

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Although they did not agree completely in their descriptions, three of Respondents' witnesses admitted that the horse had two marks at approximately the same height at the anterior pastern of each foreleg. These witnesses, Denise Rowland, F. Dale Rowland and Dr. Bricker, each depicted four scars aligned in a row on identical diagrams of the horse's legs (RX 19, 20, 22), although they placed the scars at different heights on the diagram. (RX 19, 20, 22)

There were also differences in the shapes of the scars, as depicted by Respondents' witnesses. Although both Respondents depicted a "y" shaped scar at the same relative position, one was an upright "y" and the other was an inverted "y." (CX 19 and 20) While Denise Rowland agreed with the USDA veterinarians that the scar was raised — about a quarter of an inch — on at least one scar (Tr. 268), Dr. Bricker testified that the scar was raised, but only by an eighth of an inch. (Tr. 338)

Respondents' chief contention is that the scars were not located in the area of the horse's legs properly described as the pasterns, but were actually in the area properly described as the fetlock. However, all three of the veterinarians who testified agreed with the definition of "pastern" in the Illustrated Veterinarian Encyclopedia for Horsemen, as the area above the coronary band and below the fetlock joint. The evidence shows that "fetlock," as used by Drs. Lee, Binkley and Bricker is a non-technical term which refers to the area surrounding the fetlock joint, including the upper portion of the long pastern bone. (Tr. 98, 124, 368)

That Respondents' witnesses used the terms, "fetlock" and "pastern" with less than precise meanings and were not in agreement as to the location of the scars, is evidenced by their

placement of marks depicting the scars on the diagrams in evidence. For example, the mark which Denise Rowland used to depict the scar she described as extending into the pastern area ended well above the level at which Dr. Bricker and Dale Rowland placed the scars, including those they described as being wholly within the fetlock area, above the pastern. (RX 19, 20, 22) The mark that Dale Rowland made to indicate the same scar, which he also described as possibly reaching into the pastern area, ended above the marks placed by Dr. Bricker. (Tr. 20, 22)

Respondents also rely on the theory that the scars were above the "chain pattern." This argument lacks merit. The Scar Rule's prohibition applies to the horse's pasterns and is not otherwise limited to any one area, such as a "chain pattern." 9 C.F.R. § 11.3(a). Moreover, Mr. Pennington's and Mrs. Rowland's testimony in support of this theory is not persuasive. This testimony suggested that the chains worn by "Quarterback Stock" could not reach the area of the pastern on which the scars were located, because the diameter of the chain would be too small to extend over the broad part of the foot just above the coronary band. (Tr. 219-221) This contention, however, is not supported by the photographs of "Quarterback Stock" in competition (RX 3, 11) or by the exhibits which depict the proportions of the horse's leg. (CX 1, 10)

With regard to the likely cause of the scars, I find the evidence of the Department's veterinarians to be the more persuasive. Not only were their descriptions of the scars more credible than those of Respondents' witnesses, but their training in determining compliance with the Act makes them more qualified than Dr. Bricker to determine what types of scars are indicative of "soring." Respondents' hearsay evidence as to accidental causes lacks reliability because it allegedly was made

by the seller of the horse, who was far from a disinterested declarant.

. . . .

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

The ALJ dismissed the Complaint because of the following Findings and Conclusions, which I do not adopt (Initial Decision at 14-15, 19-20):

> 19. Statements published in the Federal Register accompanying the final Scar Rule provide clarification of the regulation by the Department, *See Finest Fruits, Inc. v. Korean Produce Corp.*, [No. 87 CIV. 6579 (SWK), 1988 WL 96028 (S.D.N.Y. Sept. 6, 1988) (Text in WESTLAW), *printed in* 47 Agric. Dec. 1423, 1425 (1988)]. These statements demonstrate that the Department contemplated that "a scarred horse could be restored to a satisfactory condition with the proper care, rest, and time." 44 Fed. Reg. 25176 (1979) In response to a comment suggesting that the concept of "once sore always sore" was associated with the Scar Rule and required elimination, the Department explained that no change to the rule was necessary, in part, because "such a scarred horse could be restored to a satisfactory condition . . . ." 44 Fed. Reg. 25176 (1979)

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20. "Quarterback Stock's" scars were fully healed on June 22, 1991, and the horse was "restored to a satisfactory condition" as contemplated by the Department.

Conclusion

Since the uncontested evidence demonstrates that the scars found on "Quarterback Stock's" pasterns were fully healed and the horse was, therefore, "restored to a satisfactory condition," as contemplated by the Department's statement accompanying the final rule implementing the "Scar Rule," "Quarterback Stock" was not "sore" on June 22, 1991, within the meaning of the Horse Protection Act or the Regulations issued pursuant to the Act.

. . . .

Although "Quarterback Stock" had bilateral scars indicative of soring, I find the uncontested testimony by Dr. Bricker, that the scars on "Quarterback Stock" were healed as fully as possible, to be significant. The USDA veterinarians did not dispute Respondents' evidence that the scars were healed. In fact, they concurred with Dr. Bricker's testimony that the areas had no sensitivity. Furthermore, Respondents' witnesses testified, without contradiction, that the horse's scars were unchanged from the time that Respondents

purchased "Quarterback Stock" until the present time.

I, therefore, conclude that "Quarterback Stock," whose scars were as fully healed as possible, was "restored to a satisfactory condition," as contemplated by the Department in the final rule. As a result, "Quarterback Stock" would not "reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving." This conclusion is further supported by the uncontested evidence that "Quarterback Stock" showed no abnormal sensitivity when examined by other officials, shortly before and after the June 22, 1991, show. This included examinations by USDA veterinarians, *after* competing in horse shows, and a 1989 examination by Dr. Binkley. There is also evidence that on at least one occasion when he was inspected by veterinarians after a show, "Quarterback Stock" had been wearing chains while he competed.

I, therefore, conclude that "Quarterback Stock" was not "sore" pursuant to the Scar Rule on June 22, 1991.

I disagree with the ALJ's interpretation of the Scar Rule, which states, in its entirety (9 C.F.R. § 11.3):

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§ 11.3 Scar rule.

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the Act [(15 U.S.C. § 1824)]. The scar rule criteria are as follows:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas,[5] other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

(b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

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5. Granuloma is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents.

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The Scar Rule was promulgated pursuant to section 9 of the Act, which provides (15 U.S.C. § 1828):

> The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

Before discussing my disagreement with the ALJ's interpretation of the Scar Rule, it is important to note that at no time in this proceeding have Respondents challenged the validity of the Scar Rule, either on constitutional grounds, statutory authority grounds, or any other grounds. The Scar Rule is, of course, presumptively valid. *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 567-68 (1939); *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185 (1935); *Borden's Farm Prods. Co. v. Baldwin*, 293 U.S. 194, 209 (1934); *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (Table) (text in WESTLAW) (not to be cited as precedent under 9th Circuit Rule 36-3). Not only has the Scar Rule not been challenged, but the rulemaking record underlying the Scar Rule is not before us. Hence there would be no basis for declaring the Scar Rule invalid in this proceeding even if Respondents had challenged it.

Second, it is important to note that even though Respondents argued before the ALJ that the scars on "Quarterback Stock" are not on the horse's pasterns, that the horse is bilaterally scarred, and that the scars are not a result of abuse or intentional soring, Respondents did not appeal from the ALJ's findings and conclusions that "[o]n June 22, 1991, 'Quarterback Stock' had bilateral raised, hairless scars of approximately the same type, at the same location on the anterior pasterns of its forelegs, which

are indicative of soring" (Initial Decision at 13), and that "[t]he Scar Rule's prohibition of 'bilateral evidence of abuse, which is indicative of soring,' clearly encompasses 'Quarterback Stock's' scars" (Initial Decision at 17). (If Respondents had appealed from those findings and conclusions (see 7 C.F.R. § 1.145(b)), I would have ruled against Respondents.)

The only issue on appeal is whether the ALJ properly interpreted the Scar Rule. I disagree with his interpretation. In interpreting the Scar Rule, we should, of course, look first to the language of the Scar Rule itself. I find no ambiguity in the language of the Rule. The Scar Rule plainly states that "all" horses born after October 1, 1975, that "do not meet the following scar rule criteria shall be considered to be 'sore' and are subject to all prohibitions of section 5 of the Act." "All" means "the whole number, quantity, or amount: TOTALITY" (Webster's Third New International Dictionary, Unabridged (1981), at 54). And *see* Black's Law Dictionary (5th ed. 1979), at 68. "The word 'all' signifies 'the whole of'; . . . A more comprehensive word cannot be found in the English language." *Vandermode v. Appert*, 125 N.J. Eq. 366, 5 A.2d 868, 871 (1939). And *see Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 610-11 (1944). "A more comprehensive and all-inclusive word than 'all' can hardly be found in the English language. There is a totality about it that few words possess." *In re Central of Georgia Ry. Co.*, 58 F. Supp. 807, 813 (S.D. Ga.), *rev'd on other grounds*, 150 F.2d 453, 455-56 (5th Cir. 1945).

Under the ALJ's interpretation, *all* horses that meet the age and Scar Rule criteria are *not* considered to be sore. Only those scarred horses that have been sufficiently healed so that sensitivity is not detected upon palpation are regarded as sore, even though their scars show bilateral evidence of abuse

indicative of soring. Nothing in the language of the Scar Rule lends itself to that interpretation.

The Scar Rule is of the same nature as the peanut marketing quota provision involved in *Bowers v. United States*, 226 F.2d 424, 425 n.1 (5th Cir. 1955), which stated:

> 7 U.S.C.A. § 1359(a), as material here, provides as follows:
>
> "(a) The marketing of any peanuts in excess of the marketing quota for the farm on which such peanuts are produced, or the marketing of any peanuts from any farm for which no acreage allotment was determined, shall be subject to a penalty at a rate equal to 50 per centum of the basic rate of the loan (calculated to the nearest tenth of a cent) for farm marketing quota peanuts for the marketing year August 1-July 31. Such penalty shall be paid by the person who buys or otherwise acquires the peanuts from the producer, or, if the peanuts are marketed by the producer through an agent, the penalty shall be paid by such agent, and such person or agent may deduct an amount equivalent to the penalty from the price paid to the producer. * * * If any producer falsely identifies or fails to account for the disposition of any peanuts, an amount of peanuts equal to the normal yield of the number of acres harvested in excess of the farm acreage allotment shall be deemed to

> have been marketed in excess of the marketing quota for the farm, and the penalty in respect thereof shall be paid and remitted by the producer.

In sustaining the validity of the Department's action in assessing the penalty against a peanut producer who grew peanuts in excess of his quota and fed them to his livestock, the court held (226 F.2d at 428-29):

> [I]n our opinion the language of the statute, note 1, supra, under the authority of which the penalties were assessed and recovered, is simple and clear in its terms and meaning and wholly free from the defects, constitutional or otherwise, with which appellant charges it; and that the penalties provided for in the statute and exacted in this case were based not, as defendant claims, upon his having marketed peanuts but simply and entirely upon his failure to account for their disposition. . . . Rejecting his contention, that the quoted provisions of Sec. 1359(a) did not declare a substantive rule of law but merely created a presumption of fact, we particularly affirm to the contrary: that the language under review "an amount of peanuts * * * shall be deemed to have been marketed in excess of the marketing quota for the farm and the penalty in respect thereof shall be paid and remitted by the producer" was intended to operate not as a presumption of fact rebuttable or otherwise, but as the statement

of a substantive rule of law, the meaning, purpose and effect of which was to lay down as a rule of law that the penalty imposed for the failure to account for the disposition of the peanuts to be collected from the producer was the same as that the statute provided for excess marketing. In short, we find ourselves in complete agreement with the findings and conclusions of the district judge and with the contentions of the appellee as to the purpose and effect of the statute as they are thus set out in its brief:

. . . .

> "C. The Act creates an irrebuttable presumption; i.e. a rule of substantive law, that failure to account for the disposition of all peanuts produced subjects the producer to the penalty provisions." (Footnote omitted.)
>
> "II. The provisions of the Act are constitutional.
>
> "A. The creation of an irrebuttable presumption; i.e. a rule of substantive law that failure to account for the disposition of all peanuts produced subjects the producer to the penalty provisions, is not violative of the Constitution.

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. . . .

> . . . It is true that appellee does argue that the language "shall be deemed", etc., does create an irrebuttable presumption, but it is equally plain that the presumption argued for is not one of fact but of law. It is not, as appellant maintains, a presumption of fact, that appellant did market these peanuts, but of law, that because of his failure to report their disposition he became liable to a penalty for not doing so, and for the purpose of measuring the penalty he is to be treated as he would have been treated if he had been guilty of excess marketing.

Since the language of the Scar Rule is equally clear and unambiguous in creating an irrebuttable presumption of law as to horses of the required age that have scars showing "bilateral evidence of abuse indicative of soring," there would seem to be no need to resort to legislative history to interpret the Scar Rule. However, assuming, arguendo, the propriety of looking to the legislative history of the Scar Rule, the legislative history does not support the ALJ's interpretation. The discussion in the final rule promulgating the Scar Rule states as follows (44 Fed. Reg. 25,172, 25,176 (1979)):

> Another comment asked, "At what age does the scar rule apply?" As set forth in the proposed regulations, all horses up to and including 5-year-old horses in the 1977 horse show season would be subject to the scar rule. The Department has recently reviewed horse

industry's enforcement of its own scar rules and has found it to be lax or nonexistent. Many 2-year-old, 3-year-old, and 4-year-old horses are being found to have scars on their pasterns when inspected by Department veterinarians. Horses of these age groups were foaled after the Horse Protection Act Amendments of 1976 were enacted, and should, therefore, carry no scars on their pasterns. Due to lack of enforcement of its scar rules by the horse industry, the Department has determined to add a scar rule to the regulations and will initiate a policy of strict enforcement of the rule.

In order not to cause a severe hardship upon the horse industry by the elimination of large numbers 4- and 5-year-old horses from competition, due to the scar rule, the Department has decided to make the scar rule applicable to all 3-year-old horses in the 1979 horse show season, rather than 7 years old as proposed. Therefore, 3-year-old horses in 1979; 4-year-old horses in 1980; 5-year-old horses in 1981, etc., will be subject to the scar rule. Three-year-old horses would be eligible to compete in 3-year-old classes, 4-year-old horses would be eligible to compete in 4-year-old classes, etc. The horse industry is cautioned, however, that the Department intends to vigorously enforce the rule.

Still another comment indicated that the

> concept of "once sore—always sore," which is associated with the scar rule, should be eliminated. The Department would point out to the horse industry that the scar rule applies only to horses that were foaled and trained well after the passage of the Horse Protection Act of 1970, and after the passage of the 1976 Horse Protection Act amendments. Such horses should therefore bear no scars whatsoever if the law were being complied with. Additionally, it is conceivable that such a scarred horse could be restored to a satisfactory condition with proper care, rest, and time. The Department therefore finds no justification to change the proposed scar rule or its intent.

As stated in the legislative history of the Scar Rule just quoted, the Department advised the industry that it will "initiate a policy of strict enforcement of the rule," and that it "intends to vigorously enforce the rule" (44 Fed. Reg. 25,172, 25,176 (1979)). I interpret the comment in the legislative history that "it is conceivable that such a scarred horse could be restored to a satisfactory condition with proper care, rest, and time" (*ibid.*) to mean that it is *conceivable* that a scarred horse would no longer have scars, as defined in the Scar Rule. This interpretation is consistent with the plain language of the Scar Rule, and it achieves the purpose of the Scar Rule. The ALJ's interpretation of the legislative history would, on the other hand, completely rewrite the Scar Rule, and would defeat the purpose of the Scar Rule. The Act and the regulations without the Scar Rule adequately cover the situation where a horse has bilateral sensitivity in the pastern area. The Scar Rule was intended to

eliminate the entry or exhibition of horses that meet the age requirement and are scarred to the extent that they show bilateral evidence of abuse indicative of soring. The ALJ's interpretation of the Scar Rule is contrary to the agency's interpretation, and an agency's interpretation of its own regulation is entitled to great deference, unless it is clearly erroneous or inconsistent with the language it interprets. *Chemical Mfrs. Ass'n v. National Resources Defense Council,* 470 U.S. 116, 125-26 (1985); *Immigration and Naturalization Service v. Stanisic,* 395 U.S. 62, 72 (1969). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 844 (1984); *Bailey v. Federal Intermediate Credit Bank,* 788 F.2d 498, 499-500 (8th Cir. 1986), *cert. denied,* 479 U.S. 915 (1986).

The agency's interpretation of its own regulation (the Scar Rule) is not only consistent with the plain language of the Scar rule, but it also effectuates the purpose of the Horse Protection Act.[7] The purpose of the Horse Protection Act is to end the cruel and inhumane practice of soring horses (H.R. Rep. No. 94-1174, 94th Cong., 2d Sess. 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1698-99). Although the prohibitions in section 5 of the Act (15 U.S.C. § 1824) focus upon the showing, exhibition, and sale of the horses, the purpose of the Act is to end the practice of soring, not just the showing of sore horses. "Exercising broadly phrased rulemaking power under 15 U.S.C. § 1828, the Secretary issued regulations that prohibited soring devices and other soring methods in both general and specific terms." *American Horse Protection Ass'n, Inc. v. Lyng,* 812 F.2d 1, 2 (D.C. Cir. 1987).

With respect to the Scar Rule, the Department stated in

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7. Since the validity of the Scar Rule is not challenged in this proceeding, and the rulemaking record for the Scar Rule is not part of the record in this case, this discussion should not be regarded as complete.

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Horse Protection Enforcement, 1979: Annual Report of the Secretary of Agriculture to the President of the United States Senate and the Speaker of the House of Representatives (July 1980) at 4 (submitted pursuant to § 11 of the Act, 15 U.S.C. § 1830):

> The organized horse industry has long agreed that bilateral scars on the front pasterns are clear evidence that a horse has been sored. Some industry organizations had established a scar rule, effective with the 1974 show season, under which scarred horses 2 years old were supposed to be excluded from competition. The rule was to have been expanded to include 3-year-olds in 1975, 4-year-olds in 1976, and so on incrementally in future years.
>
> The industry's rule was not applied uniformly and then was generally ignored. Young horses new to competition continued to be entered with scars on the pasterns. The industry, however, said it could support a uniform, nationwide scar rule, and APHIS regulations establish such a rule for all horses foaled during or after 1976.

The Scar Rule serves two purposes. First, it furthers the statutory purpose of ending the cruel and inhumane practice of soring. The prohibition against showing or exhibiting a scarred horse is an obvious disincentive to the soring of horses to the extent that they would become scarred. Second, it prohibits the showing or exhibition of horses which "can reasonably be

expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving" (15 U.S.C. § 1821(3)), on account of the presence of the scars.

That the Scar Rule serves both purposes is shown by the "Auburn Study," which is a summary of a study of soring methods and techniques commissioned by the Department and conducted from September 1978 to December 1982.[8] The study found, regarding the formation of scars (CX 12, pp. 11-12):

> Two horses were used to produce scars using 16 or 14 oz. chains with clinical soring described previously. It took an unpleasant 2 months of detergent, mustard oil, and chain used to produce minimal scarring of two horses. Bleeding of pasterns first occurred in about 7 to 8 days, while exercising in chains.
>
> . . . .
>
> The animals displayed many signs of discomfort and distress during the use of chemicals and chains. Some were stiffness, trotting instead of gaiting, lying down in the stall, reluctance to move, vagueness as to surroundings, bearing more weight on hind feet, stumbling, falling, hanging the head, wobbling, altered facial expression, and a peculiar stance when standing.

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8. This study is referred to by the court in *American Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d 1, 2-3, 5-6 (D.C. Cir. 1987).

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. . . .

> Scars can be produced on pasterns with chemicals and chains but despite 2 months of efforts to do so they were small scars and barely discernible in one horse.

During those two months, the horses "were seldom exercised in chains more than 15 minutes per day," and they were not exercised everyday (CX 12, p. 12). It is indisputable that the prohibition against showing or exhibiting scarred horses furthers the statutory purpose of ending the cruel and inhumane practice of soring horses.

The Auburn Study also considered the effects of action devices on scarred horses. It was found that even eight-ounce chains "will cause raw lesions on scarred pasterns of horses when the horses are exercised 15-30 minutes per day in the devices" (CX 12, p. 14). The lesions developed "in less than 2 weeks, even when the horses are not exercised on weekends." (*Ibid.*) It is well known that Tennessee Walking Horses are customarily shown with action devices and that they are exercised and trained in action devices. It is a reasonable conclusion that a horse with scars on its pasterns, as described in the Scar Rule, "can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving" (15 U.S.C. § 1821(3)), because of the scars and the practices which created them.

The Scar Rule has had a major deterrent effect and it is a critical element in the Department's efforts to end the cruel and inhumane practice of soring, even when, as in this case, abnormal

sensitivity cannot be detected in the pastern areas by the typical pre-show examination by digital palpation and observation.[9]

Since Respondents violated the Scar Rule, they are "subject to all of the prohibitions of section 5 of the Act [(15 U.S.C. § 1824)]" (9 C.F.R. § 11.3). As to the sanction, section 6(b) of the Act states (15 U.S.C. § 1825(b)):

> (1) Any person who violates section 1824 of this title [(section 5 of the Act)] shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

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9. Pain can, of course, be concealed. The House Report on the 1976 amendments to the Act noted that "sensitivity in the limbs of a horse is frequently masked by application or injection of anesthetic substances" (H.R. Rep. No. 94-1174, 94th Cong., 2d Sess. 5 (1976).

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

(3) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court of appeals has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(4) The Secretary may, in his discretion,

> compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection.

Section 6(c) of the Act states (15 U.S.C. § 1825(c)):

> (c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

In the present case, the violation is extremely serious. The horse had bilateral scars indicative of soring, and as the Auburn Study discussed above shows, such scars are created by continuous and inhumane abuse (CX 12, pp. 11-12).[10] Although Respondents did not scar the horse, they provided a market for the scarred horse, which makes it profitable for other persons to

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10. The ALJ rejected, as do I, Respondents' contention that the scars were accidentally caused (Initial Decision at 6-7 (Finding *), 13 (Finding 16), 15-19).

subject horses to cruel and inhumane practices, leading to bilateral scars indicative of soring. Providing a market for a scarred horse is highly culpable, and despite the fact that this is Respondents' first offense, a $2,000 civil penalty is appropriate. Respondents concede that a civil penalty of $2,000 would not impose an undue hardship (Tr. 312).

Furthermore, I believe that Respondents, as owners of the horse in question, should be disqualified from showing or exhibiting horses for the minimum 1-year period, even though there is no evidence that they had knowledge that they were violating the law or an intent to violate the law, for the reasons set forth in *In re Stamper*, 42 Agric. Dec. 20, 44-63, slip op. at 38-65 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992) (Excerpt from *Stamper* attached as an Appendix hereto).

For the foregoing reasons, the following Order should be issued.

Order

1. Respondents F. Dale Rowland and Denise Rowland are assessed a civil penalty of $2,000 for violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States, and forwarded to Robert A. Ertman, Esq., Office of the General Counsel, Room 2014, South Building, United States Department of Agriculture, Washington, D.C. 20250-1400, within 30 days from the date of service of this Order on Respondents.

2. Respondents are disqualified for 1 year from showing,

exhibiting or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, horse sale or auction.

The provisions of this disqualification order shall become effective on the 30th day after service of this Order on Respondents.

Done at Washington, D.C.

August 25, 1993

s/ Donald A. Campbell
Donald A. Campbell
Judicial Officer

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APPENDIX

Excerpt from *In re Stamper,* 42 Agric. Dec. 20, 44-63 (1983), *aff'd,* 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DEPARTMENT OF AGRICULTURE DATED DECEMBER 4, 1992

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 92-5

In re:

F. Dale Rowland and Denise Rowland,

Respondents

DECISION AND ORDER

This is a disciplinary administrative proceeding under the Horse Protection Act ("the Act"), as amended, 15 U.S.C. § 1821 *et seq.*, and the regulations issued pursuant to the Act, 9 C.F.R. §§ 11.1-11.41 ("the Regulations"). This proceeding was instituted by a Complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), on December 6, 1991. The Complaint alleged that Respondents, Denise Rowland and F. Dale Rowland entered and allowed the entry of a horse for showing while the horse was sore, in violation of the Act at 15 U.S.C. § 1824(2). The Administrator seeks the imposition of civil penalties and the disqualification of Respondents from significant participation in the horse industry as provided under section 6(c) of the Act, 15 U.S.C. § 1825(c). Respondents filed a timely Answer on January 6, 1992, and an Amended Answer (hereinafter referred to as "the Answer") on January 21, 1992, in which they denied the material allegations of the Complaint.

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I presided over a hearing on August 4 and 5, 1992, in Cleveland, Ohio. Complainant was represented by Robert Ertman, Esq., of the Office of the General Counsel, U.S. Department of Agriculture. Respondents were represented by David N. Patterson, Esq. The parties filed proposed findings of fact, proposed conclusions of law and briefs on November 2, 1992. All proposed findings proposed conclusions and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the evidence.

Upon consideration of all evidence and the relevant law, the Complaint is dismissed for the reasons stated below.

Statutes and Regulations

The following statutory provisions are applicable:

> As used in this chapter unless the context otherwise requires:
>
> * * * * *
>
> (3) The term "sore" when used to describe a horse means that—
>
> (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,
>
> and, as a result of such application, infliction, injection, use or practice, such

horse *suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving,* except that such term does not include such an application, infliction, injection, use or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the state in which such treatment was given.[1]

* * * * *

The following conduct is prohibited:

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.[2]

* * * * *

(d) . . . (5) In any civil or criminal action to

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1. 15 U.S.C.A. § 1821(3)(D). (emphasis added)

2. 15 U.S.C.A. § 1824(2).

enforce this Act or any regulation under this Act a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.[3]

* * * * *

(b)(1) Any person who violates section 1824 of this Title shall be liable to the United States for a civil penalty of not more than, $2,000 for each violation.[4]

* * * * *

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who . . . (a) . . . paid a civil penalty assessed under subsection (b) . . . for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, . . . from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation . . . .[5]

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3. 15 U.S.C.A. § 1825(d)(5).

4. 15 U.S.C.A. § 1825(b)(1).

5. 15 U.S.C.A. § 1825(c).

Appendix C

All horses born on or after October 1, 1975, are subject to the "Scar Rule," 9 C.F.R. § 11.3(a), which provides:

> The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas,[6] other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

Findings of Fact

1. Respondents F. Dale Rowland and Denise Rowland are individuals whose mailing address is 9362 Read Road, Cambridge, Ohio 43725. (Answer, ¶ I A)

2. At all times relevant, F. Dale Rowland and Denise Rowland jointly owned the horse known as "Quarterback Stock," (CX 1; Tr. 11) and F. Dale Rowland was the trainer of "Quarterback Stock." (CX 1, 5-7)

3. Denise Rowland entered "Quarterback Stock" as entry number 522, Class 14, on June 22, 1991, at the Greenback Classic Horse Show at Randolph, Ohio. (CX 1, 5-7; Tr. 390)

4. On June 22, 1991, "Quarterback Stock" was a twelve year old horse, born after October 1, 1975, and was therefore subject to the Scar Rule. (9 C.F.R. § 11.3; CX 1, 5)

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6. "Granuloma" is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents.

5. Designated Qualified Person ("DQP") Harold Pennington inspected "Quarterback Stock" for compliance with the Act on the day of the Greenback Classic and passed the horse for participation in the show. (CX 2-4)

6. USDA veterinarian, Gwen Lee, D.V.M., attended the Greenback Classic to examine horses for compliance with the Act. Dr. Lee attended a week-long Departmental training course in determining compliance with the Act in February 1991. (Tr. 71-72). Dr. Lee testified that she remembered examining Respondents' horse because:

> Ms. Rowland got quite upset and she got very angry and she started yelling . . . . She told us she was going to sue us and then about a month later, we were named in a lawsuit for three-quarters of a million dollars . . . . (Tr. 72)

> It was obviously such a big deal, you know, that Ms. Rowland got very upset and the lawsuit came out and it's something that is sort of burned in my memory, because it was obvious that it was going to be a very important event." (Tr. 107)

The Greenback Classic was the only show at which Dr. Lee examined horses for compliance with the Act. (Tr. 71)

7. Dr. Lee found that "Quarterback Stock" had bilateral scars on the anterior pasterns of his forelegs and she, therefore, found him to be out of compliance with the Act based upon the "Scar Rule," 9 C.F.R. § 11.3(a). (CX 1 and 2; Tr. 72-73) She

described the horse's bilateral scars as being at two areas. These were scars at the high end of the long pastern bone on each leg, approximately the size of quarters, and smaller scars, approximately the size of nickels, on each leg, at the mid-range of the long pastern bone. (CX 1; Tr. 73, 81-82) Dr. Lee judged the scars to be at approximately the same height on each leg, below the fetlock joint. (CX 1, 8A; Tr. 98, 121) On the back of the Summary of Alleged Violation form, Dr. Lee noted, "Bilateral scarring - obvious — front fetlocks." (CX 1) She explained the term "fetlock":

> When I said that the scarring was obvious front fetlocks, I meant that it was up towards the fetlock joint, but it was clearly, in my mind, over the pastern joint — over the pastern bone, which is where it's illegal to have scarring, according to the regulations." (Tr. 98)

Dr. Lee described the scars as "raised whitish-pink focal areas of granulation tissue, with no hair," which were raised about a quarter of an inch. (Tr. 90) As to the likely cause of the scars, she testified:

> If it's an abrasion, you don't really expect to get that raised granulation tissue. It's more of a flatter healing that's formed, it's not the raised tissue .... That indicates more of a chronic insult to the skin .... (Tr. 96)

Dr. Lee testified that chains could reach the area of the scars. (Tr. 135) However, she found that the horse had no sensitivity to palpation. (CX 1, 2; Tr. 97, 142)

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8. Miava Binkley, D.V.M., an experienced USDA veterinarian, also examined "Quarterback Stock" on June 22, 1991. (CX 1, 3; Tr. 157) She also remembered examining the horse because of the following event:

> I had to go over to Ms. Rowland and tell her the horse — we found the horse to be sore because it was scarred, at which point she became very very upset, very very agitated. . . . [S]he began yelling and screaming, threatening us, threatening to sue us. . . . [S]he had a small crowd of people started to gather and watch the commotion, so I remember it very well. (Tr. 157-158)

Only one horse was found to be sore at the Greenback show, the last show at which Dr. Binkley examined horses for compliance with the Act. (Tr. 174, 223) "Quarterback Stock" was the only horse that Dr. Binkley found to be sore during the 1991 show season. (Tr. 175)

Dr. Binkley concurred with Dr. Lee that the horse was sore based upon the Scar Rule. (CX 1, 2, 3; Tr. 157-158) Dr. Binkley testified that the scars on the upper area of the pasterns of each leg, just below the fetlock, were about an inch in diameter, pinkish, raised and rounded. (Tr. 158-159) Dr. Binkley also reported smaller, bilateral scars lower on the pastern. (CX 1, and 3; Tr. 158) On the back of the Summary of Alleged Violation form, Dr. Binkley noted, "horse scarred, front fetlocks (low on fetlocks)." (CX 1)

In response to questions regarding the meaning of the terms "pastern" and "fetlock," Dr. Binkley agreed with the definition of

"pastern" contained in the Illustrated Veterinarian's Encyclopedia for Horsemen as "the area between the fetlock joint and the coronary band." (Tr. 163) She further testified:

> Q. Doctor, if somebody puts the emphasis in the definition of fetlock on the *area of the joint,* does this keep the pastern from running all the way up to the fetlock joint itself?
>
> A. No. I think there's some area of overlap between the two. The pastern and the fetlock are general horsemen's terms of areas of a horse's confirmation. The pastern derives its name because the pastern area that horsemen refer to lies directly over the pastern bones, which there are two, the long pastern bone and short pastern bone. (Tr. 163) (emphasis added)

She explained her use of the term "fetlock" in her notes as follows:

> "Fetlock, a lot of horsemen use that term fairly loosely to refer to the joint or the area around the joint, much as I did in my little notes to myself, it's a very general loose term. However, the long pastern bone does extend all the way to the fetlock joint, that's made up

> of the long pastern bone and the cannon bone. So to me, there is some overlap in those two terms." (Tr. 164)

With respect to the cause of the scars on "Quarterback Stock," Dr. Binkley testified:

> An abrasion, typically, if it's a one time occurrence, a horse might fall or scrape itself . . . that would typically tend to heal with a flat-type of scar. . . . The scars I saw were rounded and raised, which is something you typically don't see on a one-time injury-type scar.
>
> Usually, if you've got a raised scar, that means the body put up a profilifitive (sic) wound healing defense against an injury that's happened more than once, ... So that would account for the raised nature of this scar that probably it happened on some kind of chronic insult or injury to that area of the foot. (Tr. 165-166)

9. When advised of the veterinarians' finding that "Quarterback Stock" was in violation of the Scar Rule, DQP Pennington declined to reverse his earlier decision and issue a ticket excluding the horse from competition as sore. (CX 3; Tr. 187) In a statement given to USDA inspector Don Castner on the day of the show, Mr. Pennington indicated that his decision not to issue a ticket excluding Respondents' horse from competition was based upon his opinion that the scars on the horse's left foot were above the "chain pattern." (CX 3)

10. Mr. Pennington testified that he found it hard to remember since it had "been a while" since he had examined the horse, but to the best of his knowledge "Quarterback Stock" has "hair loss on one foot," and "two or three small places that are above the ankle that are round and flat." (Tr. 218) Mr. Pennington expressed the opinion that the horse "has enough hair loss and enough raise that you would call him out in the left foot." (Tr. 248-249) He believed that the remaining two or three marks at issue were not chain scars. (Tr. 249) He stated that "to be a scar they have to be raised, they have to be granulated," rather than the slick areas which were pink and soft and not granulated. (Tr. 250)

With regard to the "chain pattern," Mr. Pennington first testified:

> "I told her [the veterinarian] if the chains came up that high and they went down over the coronet band and you had a real problem." (Tr. 219)

Some of his additional testimony was ambiguous:

> Q. Okay. If it doesn't go down as far as the coronet band, then it wouldn't go up as far as the fetlock?
>
> A. It wouldn't go up *above the ankle.*
>
> Q. Okay. Did you ever see one that went *above the fetlock?*

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A. No, not really, no. (Tr. 221) (emphasis added)

11. Denise Rowland testified that when she purchased "Quarterback Stock," the horse had the same marks that he bore on June 22, 1991 (Tr. 259, 265), which she described as "smooth hairless spots on his feet," that "aren't technically scars." (Tr. 259-260) She later added that, "it's hair follicle damage — which means the hair will never grow on that spot." (Tr. 262) As to the size of the scars, Ms. Rowland stated, "the biggest one is about the size of my fingernail, my small fingernail." She testified that "three of them are perfectly flat," and "on the left foot is the only raised one he has . . .," (Tr. 262-263) which is raised "about a quarter of an inch." (Tr. 268) Ms. Rowland testified that the scars were located "on the fetlock," (Tr. 267) higher, more to the outside of the leg, and less round that the USDA veterinarians depicted them on the Summary of Alleged Violation form. (CX 1; Tr. 289) She testified that the veterinarians had depicted scars which were not present on the horse's feet. (Tr. 290)

Ms. Rowland described the shape of the scars variously. First she stated, "One is "y" shaped, one is kind of irregular shaped — and two are spots." (Tr. 261) Later, she described the outside right scar as a "long narrow scar." (Tr. 267) Ms. Rowland indicated the shape and location of the scars on a diagram depicting four marks in a row across the anterior pasterns of the horse's forelegs, at approximately the same height, two on each leg, beneath the widest part of the rounded area at the top of the diagram which represents the first joint above the hoof. (CX 19)

Ms. Rowland responded "no" when asked if a chain goes "in the area where those marks are?" She explained:

"You're going to have to have one half inch

> above the coronary band so that when you pull the chain forward it cannot hit, Okay? And it's only going to go up into this area here because it doesn't have room to go back and forth." (Tr. 268)

She testified that the previous owner told her that "Quarterback Stock's" scars were caused by a fall on concrete and wrap injuries, when the horse's legs were wrapped after the fall. (Tr. 307)

12. F. Dale Rowland testified that "Quarterback Stock" had "small places — hairless places, on his fetlock area," when Respondents purchased the horse, (Tr. 391) "two on each fetlock," which he described as "smooth bald spots." (Tr. 393) He stated that they've "never changed" since they bought the horse. (Tr. 392) He described the scars as "about the size of my thumb, little fingernail," and stated that "this one here on the left front outside is raised slightly." (Tr. 404) He added, "this is one that may possibly go into the pastern area slightly." (Tr. 404) He described the shape of the raised scar by saying "it runs in an angle." He described the other scars as follows: "this one is sort of circular on the right foot and this one on the left outside. This one is kind of like a "y" shape on the inside of the right." (Tr. 405) He expressed the opinion that no scars were in the chain pattern and denied that there were more than four scars. (Tr. 406, 411) In response to questioning about the cause of the scars, Mr. Rowland testified that the previous owner "said he fell on concrete or asphalt or something to that effect." (Tr. 392) He depicted the scars on a diagram of horse's legs as four marks aligned at approximately the same height, lower than the marks depicted by Denise Rowland and higher than the marks made by Dr. Bricker. (RX 22; Tr. 393)

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13. Respondents' veterinarian, Michael Bricker, D.V.M., testified that he has an interest in equine medicine and surgery (Tr. 323) and seventy-five per-cent of his work is with equines. (Tr. 344) Dr. Bricker stated that he has been treating Respondents' horses for about 25 months, (Tr. 324) and that he examined "Quarterback Stock" on June 24, 1991. (Tr. 331) He described the horse's scars as follows.

> I saw some hairless areas that — I feel is more on the fetlock area than on the pastern area. Minor hairless are — there's one area on the left front that is probably — starts at the fetlock and goes down into the pastern. That one is slightly raised. The other ones are just hairless areas that aren't raised. (Tr. 331-332)

Bricker described the shape of the scars as follows:

> There's one that's — that I would consider a linear line. That was a left front leg on the anterior lateral surface. That is a — that is a line. The other mark on the left front is a circular area. The one on the right front, I think — if I recall, you get down and you spread the hairs. It kind of makes a "y" shape .... on the right front anterior medial surface and on the outside it's — it's more of a — I don't want to say a line, it was more of a circular type area then, too.

In response to my questioning, Dr. Bricker gave the following testimony which is somewhat inconsistent with the preceding description.

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Q. With respect to the marks that were circular in shape, comparing them to coins, pennies, nickels, quarters, what size would you compare them to?

A. Probably in between a nickel and a dime.

Q. For all *three marks that are circular*?

A. Right. (Tr. 337) (emphasis added)

With regard to the one raised scar, the witness stated that it had "possibly an eighth of an inch raise." (Tr. 338) Dr. Bricker did not recall seeing more than two scars on either leg. (Tr. 355-356) He did not record his observations of the scars on June 24, 1991. (Tr. 363)

In testimony with regard to definitions of the "fetlock area" and "pastern," Dr. Bricker introduced a diagram of a horse which identified the fetlock joint as in the center of the first round ball above the hoof, also identified as "ankle." (RX 21) He concurred with the depiction of pastern area which Mr. Pennington had drawn on a diagram (CX 10-C), as extending downward from midway on the long pastern bone to midway on the shorter bone below. (Tr. 351) Dr. Bricker also stated that he agreed with the definition of "pastern" in the Illustrated Veterinarian's Encyclopedia for Horsemen, as "the area between the fetlock joint and the coronary band." (Tr. 361) He stated:

Now if you want to get technical yes, the fetlock is that joint and I cannot clinically go out and look at a horse and point to that — the

> line going from the cannon bone to the pastern bone, so I'd say it's the, you know, the round surface that you see above the — above the hoof. (Tr. 368)

Dr. Bricker described the depiction of scars by the Department's veterinarians (CX 1) as "mid-region of the pastern area," (Tr. 352) and stated that they were "marked a *little bit low*." (Tr. 353) (emphasis added) He depicted the scars on an identical diagram as four marks aligned, two on each of the horse's forelegs, at approximately the same height, slightly above the narrowest part of the leg, lower than the height depicted by both Respondents. (CX 19, 20, 22)

With respect to the cause of the scars, Dr. Bricker testified that he "would not want to venture to say," but stated, "I have seen sores — scars from soring and the ones that I have seen are usually lower on the leg and the ones that I've seen have been linear." (Tr. 343)

14. Dr. Bricker described "Quarterback Stock's" scars as "healed as much as possible," He said, "I mean, it's causing the animal no problem and they're cool. In other words, they're not warm to the touch and that's as good as they're going to get." (Tr. 344) In response to questions, Dr. Bricker added:

> "If they're warm, warmth tells you inflammation, there's still some healing processes going on or some kind of inflammatory process going on and these are — like I said, these are, — to me they look like old wounds and they've been there awhile and they are definitely cool to the

> touch and they — they're as good as we're going to get . . . . every [sic] since I've been doing their work I've never had to treat the lower leg." (Tr. 345)

He responded, "yes" when asked if the marks were unchanged over the period that he had examined the horse. (Tr. 359) In response to questioning about the relative ease of healing a horse's lower leg injury, Dr. Bricker testified:

> It's just much harder to get a lower leg injury to heal. . . . It's mostly due to the movement, what they call mic — micromovement of that area."

He also stated that, "every time an animal moves you just get a little bit of movement, irritates the area. . . ." (Tr. 342) He stated that the horse had feeling but not increased sensitivity at the scars. (Tr. 366)

15. The area of a horse, referred to in the Scar Rule, 9 C.F.R. § 11.3(a) as the "pastern," is the area above the coronary band and below the fetlock joint — the joint of the long pastern bone and the cannon bone. (Tr. 163, 361-362)

16. On June 22, 1991, "Quarterback Stock" had bilateral raised, hairless scars of approximately the same type, at the same location on the anterior pasterns of its forelegs which are indicative of soring.

17. The scars on "Quarterback Stock" have remained unchanged from the time that Respondents purchased the horse until the present time, including June 22, 1991. (Tr. 218, 247, 275)

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18. "Quarterback Stock" was examined by USDA veterinarians after competing in horse shows on May 17, 1991 (RX 23), and on October 4 and 5, 1991, when he was photographed after competition wearing chains. (RX 12, 23; Tr. 277, 283) He was inspected by DQPs on April 19-20, April 27, May 17, May 25, June 14-15, July 3-6, July 12-13, July 27 and October 4-5, 1991. He also underwent post-show inspections on May 17 and May 25, 1991. (RX 23) Dr. Binkley examined "Quarterback Stock" in 1989 after he won the competition at the Ohio Celebration. (RX 7; Tr. 274-276) During none of these inspections was "Quarterback Stock" found to be sore.

19. Statements published in the Federal Register accompanying the final Scar Rule provide clarification of the regulation by the Department, *See, Finest Fruit, Inc. v. Korean Produce Corp.*, 47 Agric. Dec. 1423, 1425 (S.D.N.Y. 1988). These statements demonstrate that the Department contemplated that "a scarred horse could be restored to a satisfactory condition with proper care, rest, and time." 44 Fed. Reg. 25176 (1979) In response to a comment suggesting that the concept of "once sore always sore" was associated with the Scar Rule and required elimination, the Department explained that no change to the rule was necessary, in part, because "such a scarred horse could be restored to a satisfactory condition. . . ." 44 Fed. Reg. 25176 (1979)

20. "Quarterback Stock's" scars were fully healed on June 22, 1991, and the horse was "restored to a satisfactory condition" as contemplated by the Department.

Conclusion

Since the uncontested evidence demonstrates that the scars

found on "Quarterback Stock's" pasterns were fully healed and the horse was, therefore, "restored to a satisfactory condition," as contemplated by the Department's statement accompanying the final rule implementing the "Scar Rule," "Quarterback Stock" was not "sore" on June 22, 1991, within the meaning of the Horse Protection Act or the Regulations issued pursuant to the Act.

Discussion

Although the testimony is conflicting as to the precise size, shape, appearance and location of the scars on "Quarterback Stock," the preponderance of credible evidence supports Complainant's contention that the animal bore bilateral scars, of approximately the same size, degree and location on the anterior pasterns of its forelegs. As stated by the Department in the Federal Register, 43 Fed. Reg. 18519 (1978), when the Scar Rule was proposed, such bilateral scars of approximately the same degree, at approximately the same location, are not likely the result of an accident, and are indicative of "soring." This conclusion is particularly warranted, where, as here, multiple scars appear at the same relative positions on each foot.

With regard to the description of the scars, I find more persuasive the precise and consistent descriptions of the two USDA veterinarians. Dr. Lee's and Dr. Binkley's credibility were enhanced by the fact that their concurring statements were recorded shortly after they examined the horse and their testimony was based upon their memory of the events.

The descriptions by Respondents' witnesses were less precise and less consistent with each other. Denise Rowland, DQP Pennington and Dr. Bricker were somewhat inconsistent in their own positions. In addition, Dr. Bricker's testimony is less

reliable because he did not record his observations at the time of his examination, as did Drs. Lee and Binkley.

Mr. Pennington's decision on the day of the show not to write a ticket for "Quarterback Stock" was based upon his belief that the scars on the left foot were above the "chain pattern." He did not contend at that time, as he did later, that the "marks" were not scars of the type prohibited by the regulation. When he testified as to the appearance and location of the scars, he began by acknowledging that it was "hard to remember," since it had "been a while" since he examined the horse. While he believed that the horse was out of compliance on one foot, he testified that the remaining two or three marks, about which he disagreed with the Department's veterinarians, were flat, not granulated, and not chain scars.

Although Mr. Pennington, and the other witnesses for Respondents emphasized their disagreement over these characteristics, none is specifically required under the rule. Scars need not be shown to be raised, granulated or caused by chains. While the rule refers to "granuloma" this term is defined as "a focal *lesion* formed as a result of inflammatory reactions caused by biological, chemical or *physical* agents." 9 C.F.R. § 11.3(a) n.5 (emphasis added) Although the term "lesion" is not explained in the rule, the International Dictionary of Medicine and Biology,[7] volume II, of which official notice is taken, defines "lesion" at page 1565 as "a pathological *alteration in the structure* or function of a tissue or organ." (emphasis added) In fact, Respondents offer no basis for their contention that the scars are not of the type and severity prohibited by the Scar Rule. (Brief for Respondents at 15) The Scar Rule's prohibition of "bilateral

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7. John Wiley & Sons, New York, 1986.

evidence of abuse, which is indicative of soring," clearly encompasses "Quarterback Stock's" scars.

Although they did not agree completely in their descriptions, three of Respondents' witnesses admitted that the horse had two marks at approximately the same height at the anterior pastern of each foreleg. These witnesses, Denise Rowland, F. Dale Rowland and Dr. Bricker, each depicted four scars aligned in a row on identical diagrams of the horse's legs (RX 19, 20, 22), although they placed the scars at different heights on the diagram. (RX 19, 20, 22)

There were also differences in the shapes of the scars, as depicted by Respondents' witnesses. Although both Respondents depicted a "y" shaped scar at the same relative position, one was an upright "y" and the other was an inverted "y". (CX 19 and 20) While Denise Rowland agreed with the USDA veterinarians that the scar was raised — about a quarter of an inch — on at least one scar (Tr. 268), Dr. Bricker testified that the scar was raised, but only by an eighth of an inch. (Tr. 338)

Respondents' chief contention is that the scars were not located in the area of the horse's legs properly described as the pasterns, but were actually in the area properly described as the fetlock. However, all three of the veterinarians who testified agreed with the definition of "pastern" in the Illustrated Veterinarian Encyclopedia for Horsemen, as the area above the coronary band and below the fetlock joint. The evidence shows that "fetlock," as used by Drs. Lee, Binkley and Bricker is a non-technical term which refers to the area surrounding the fetlock joint, including the upper portion of the long pastern bone. (Tr. 98, 124, 368)

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That Respondents' witnesses used the terms, "fetlock" and "pastern" with less than precise meanings and were not in agreement as to the location of the scars, is evidenced by their placement of marks depicting the scars on the diagrams in evidence. For example, the mark which Denise Rowland used to depict the scar she described as extending into the pastern area ended well above the level at which Dr. Bricker and Dale Rowland placed the scars, including those they described as being wholly within the fetlock area, above the pastern. (RX 19, 20, 22) The mark that Dale Rowland made to indicate the same scar, which he also described as possibly reaching into the pastern area, ended above the marks placed by Dr. Bricker. (Tr. 20, 22)

Respondents also rely on the theory that the scars were above the "chain pattern." This argument lacks merit. The Scar Rule's prohibition applies to the horse's pasterns and is not otherwise limited to any one area, such as a "chain pattern." 9 C.F.R. § 11.3(a) Moreover, Mr. Pennington's and Mrs. Rowland's testimony in support of this theory is not persuasive. This testimony suggested that the chains worn by "Quarterback Stock" could not reach the area of the pastern on which the scars were located, because the diameter of the chain would be too small to extend over the broad part of the foot just above the coronary band. (Tr. 219-221) This contention, however, is not supported by the photographs of "Quarterback Stock" in competition (RX 3, 11) or by the exhibits which depict the proportions of the horse's leg. (CX 1, 10)

With regard to the likely cause of the scars, I find the evidence of the Department's veterinarians to be the more persuasive. Not only were their descriptions of the scars more credible than those of Respondents' witnesses, but their training in determining compliance with the Act makes them more

qualified than Dr. Bricker to determine what types of scars are indicative of "soring." Respondents' hearsay evidence as to accidental causes lacks reliability because it allegedly was made by the seller of the horse, who was far from a disinterested declarant.

Although "Quarterback Stock" had bilateral scars indicative of soring, I find the uncontested testimony by Dr. Bricker, that the scars on "Quarterback Stock" were healed as fully as possible, to be significant. The USDA veterinarians did not dispute Respondents' evidence that the scars were healed. In fact, they concurred with Dr. Bricker's testimony that the areas had no sensitivity. Further, Respondents' witnesses testified, without contradiction, that the horse's scars were unchanged from the time that Respondents purchased "Quarterback Stock" until the present time.

I, therefore, conclude that "Quarterback Stock," whose scars were as fully healed as possible, was "restored to a satisfactory condition," as contemplated by the Department in the final rule. As a result, "Quarterback Stock" would not "reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving." This conclusion is further supported by the uncontested evidence that "Quarterback Stock" showed no abnormal sensitivity when examined by other officials, shortly before and after the June 22, 1991, show. This included examinations by USDA veterinarians, *after* competing in horse shows, and a 1989 examination by Dr. Binkley. There is also evidence that on at least one occasion when he was inspected by veterinarians after a show, "Quarterback Stock" had been wearing chains while he competed.

I, therefore, conclude that "Quarterback Stock" was not "sore" pursuant to the Scar Rule on June 22, 1991.

Appendix C

Order

The Complaint is dismissed.

s/ Edwin S. Bernstein
EDWIN S. BERNSTEIN
Administrative Law Judge

December 4, 1992

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution Amendment V

AMENDMENT V — GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

9 C.F.R. Ch. 1

§ 11.3 Scar rule.

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas,[5]

5. Granuloma is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflamatory reactions caused by biological, chemical, or physical agents.

other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

(b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

[44 FR 25179, Apr. 27, 1979, as amended at 53 FR 14782, Apr. 26, 1988, 53 FR 28373, July 28, 1988] APHIS

15 U.S.C. §§ 1821-1825

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

(1) The term "management" means any person who organizes, exercises control over, or administers or who is responsible for organizing, directing, or administering.

(2) The term "Secretary" means the Secretary of Agriculture.

(3) The term "sore" when used to describe a horse means that —

> **(A)** an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

(4) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(Pub.L. 91-540, § 2, Dec. 9, 1970, 84 Stat. 1404, Pub.L. 94-360, § 3, July 13, 1976, 90 Stat. 915.)

§ 1822. Congressional statement of findings

The Congress finds and declares that —

(1) the soring of horses is cruel and inhumane;

(2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;

(3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;

(4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and

(5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

(Pub.L. 91-540, § 3, Dec. 9, 1970, 84 Stat. 1405, Pub.L. 94-360, § 4, July 13, 1976, 90 Stat. 915.)

§ 1823. Horse shows and exhibitions

Disqualification of horses

(a) The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with the regulations under subsections (c) of this section or by the Secretary that the horse is sore.

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Prohibited activities

(b) The management of any horse sale or auction shall prohibit the sale or auction or exhibition for the purpose of sale of any horse (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section by the Secretary that the horse is sore.

Appointment of inspectors; manner of inspections

(c) The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

Recordkeeping and reporting requirements; availability of records

(d) The management of a horse show, horse exhibition, or horse sale or auction shall establish and maintain such records, make such reports, and provide such information as the Secretary may by regulation reasonably require for the purposes of

implementing this chapter or to determine compliance with this chapter. Upon request of an officer or employee duly designated by the Secretary, such management shall permit entry at all reasonable times for the inspection and copying (on or off the premises) of records to be maintained under this subsection.

Inspection by Secretary or duly appointed representative

(e) For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

(Pub. L. 91-540, § 4, Dec. 9, 1970, 84 Stat. 1405; Pub. L. 94-360, § 5, July 13, 1976, 90 Stat. 916.)

§ 1824. Unlawful acts

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale

or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (c) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.

(3) The failure by the management of any horse show or horse exhibition, which does not appoint and retain a person in accordance with section 1823(c) of this title, to disqualify from being shown or exhibited any horse which is sore.

(4) The failure by the management of any horse sale or auction, which does not appoint and retain a qualified person in accordance with section 1823(c) of this title, to prohibit the sale, offering for sale, or auction of any horse which is sore.

(5) The failure by the management of any horse show or horse exhibition, which has appointed and retained a person in accordance with section 1823(c) of this title, to disqualify from being shown or exhibited any horse (A) which is sore, and (B) after having been notified by such person or the Secretary that the horse is sore or after otherwise having knowledge that the horse is sore.

(6) The failure by the management of any horse sale or auction which has appointed and retained a person in accordance with section 1823(c) of this title, to prohibit the sale, offering for sale, or auction of any horse (A) which is sore, and (B) after having been notified by such person or the Secretary or after otherwise having knowledge that the horse is sore.

(7) The showing or exhibiting at a horse show or horse exhibition; the selling or auctioning at a horse sale or auction; the allowing to be shown, exhibited, or sold at a horse show, horse exhibition, or horse sale or auction; the entering for the purpose of showing or exhibiting in any horse show or horse exhibition; or offering for sale at a horse sale or auction, any horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under Section 1828 of this title prohibits to prevent the soring of horses.

(8) The failing to establish, maintain, or submit records, notices, reports, or other information required under section 1823 of this title.

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

(10) The removal of any marking required by the Secretary to identify a horse as being detained.

(11) The failure or refusal to provide the Secretary with adequate space or facilities, as the Secretary may by regulation under section 1828 of this title prescribe, in which to conduct inspections or any other activity authorized to be performed by the Secretary under this chapter.

Appendix D

(Pub. L. 91-540, § 5, Dec. 9, 1970, 84 Stat. 1405; Pub.L. 94-360, § 6, July 13, 1976, 90 Stat. 916.)

§ 1825. Violations and penalties

Criminal acts and penalties

(a)(1) Except as provided in paragraph (2) of this subsection, any person who knowingly violates section 1824 of this title shall, upon conviction thereof, be fined not more than $3,000, or imprisoned for not more than one year, or both.

(2)(A) If any person knowingly violates section 1824 of this title, after one or more prior convictions of such person for such a violation have become final, such person shall, upon conviction thereof, be fined not more than $5,000, or imprisoned for not more than two years, or both.

(B) Any person who knowingly makes, or causes to be made, a false entry or statement in any report required under this chapter; who knowingly makes, or causes to be made, any false entry in any account, record, or memorandum required to be established and maintained by any person or in any notification or other information required to be submitted to the Secretary under section 1823 of this title; who knowingly neglects or fails to make or cause to be made, full, true, and correct entries in such accounts, records, memoranda, notification, or other materials; who knowingly removes any such documentary evidence out of the jurisdiction of the United States; who knowingly mutilates, alters, or by any other means falsifies any such documentary evidence; or who knowingly refuses to submit any such documentary evidence to the Secretary for inspection and copying shall be guilty of an offense against the United States,

and upon conviction thereof shall be fined not more than $5,000, or imprisoned for not more than three years, or both.

(C) Any person who forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person while engaged in or on account of the performance of his official duties under this chapter shall be fined not more than $5,000, or imprisoned not more than three years, or both. Whoever, in the commission of such acts, uses a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both. Whoever kills any person while engaged in or on account of the performance of his official duties under this chapter shall be punishable as provided under sections 1111 and 1112 of Title 18.

Civil penalties; review and enforcement

(b)(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may

obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of Title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

(3) If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order, or after the appropriate court of appeals has entered final judgment in favor of the Secretary, the Secretary shall refer the matter to the Attorney General, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the civil penalty shall not be subject to review.

(4) The Secretary may, in his discretion, compromise, modify, or remit, with or without conditions, any civil penalty assessed under this subsection.

Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

(c) In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any

violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

Production of witnesses and books, papers, and documents; depositions; fees; presumptions; jurisdiction

(d)(1) The Secretary may require by subpena the attendance and testimony of witnesses and the production of books, papers, and documents relating to any matter under investigation or the subject of a proceeding. Witnesses summoned before the Secretary shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(2) The attendance of witnesses, and the production of

books, papers, and documents, may be required at any designated place from any place in the United States. In case of disobedience to a subpena the Secretary, or any party to a proceeding before the Secretary, may invoke the aid of any appropriate district court of the United States in requiring attendance and testimony of witnesses and the production of such books, papers, and documents under the provisions of this chapter.

(3) The Secretary may order testimony to be taken by deposition under oath in any proceeding or investigation pending before him, at any stage of the proceeding or investigation. Depositions may be taken before any person designated by the Secretary who has power to administer oaths. The Secretary may also require the production of books, papers, and documents at the taking of depositions.

(4) Witnesses whose depositions are taken and the persons taking them shall be entitled to the same fees as paid for like services in the courts of the United States or in other jurisdictions in which they may appear.

(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

(6) The United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the highest court of American Samoa, and the United States courts of the other territories, are vested with jurisdiction specifically to enforce, and to prevent and restrain violations of this chapter, and shall have jurisdiction in all other kinds of cases arising under this chapter, except as provided in subsection (b) of this section.

Appendix D

Detention of horses; seizure and condemnation of equipment

(e)(1) The Secretary may detain (for a period not to exceed twenty-four hours) for examination, testing, or the taking of evidence, any horse at any horse show, horse exhibition, or horse sale or auction which is sore or which the Secretary has probable cause to believe is sore. The Secretary may require the temporary marking of any horse during the period of its detention for the purpose of identifying the horse as detained. A horse which is detained subject to this paragraph shall not be moved by any person from the place it is so detained except as authorized by the Secretary or until the expiration of the detention period applicable to the horse.

(2) Any equipment, device, paraphernalia, or substance which was used in violation of any provision of this chapter or any regulation issued under this chapter or which contributed to the soring of any horse at or prior to any horse show, horse exhibition, or horse sale or auction, shall be liable to be proceeded against, by process of libel for the seizure and condemnation of such equipment, device, paraphernalia, or substance, in any United States district court within the jurisdiction of which such equipment, device, paraphernalia, or substance is found. Such proceedings shall conform as nearly as possible to proceedings in rem in admiralty.

(Pub. L. 91-540, § 6, Dec. 9, 1970, 84 Stat. 1406, Pub.L. 94-360, § 7, July 13, 1976, 90 Stat. 918.)

APPENDIX E — SIXTH CIRCUIT PER CURIAM OPINION IN *RICHARD POLCH, ET AL., V. UNITED STATES DEPARTMENT OF AGRICULTURE*
FILED JULY 27, 1994

NOT FOR PUBLICATION
93-3369
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RICHARD POLCH, ET AL.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE,

Respondent.

BEFORE: KEITH, MARTIN, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

PER CURIAM: Petitioners Richard and Merrie Polch (the "Polches") appeal the decision of the Department of Agriculture assessing a civil penalty and a one year disqualification in a disciplinary proceeding pursuant to the Horse Protection Act of 1970 ("HPA"), 15 U.S.C. § 1821 et seq. For the reasons stated below, we **AFFIRM.**

In March 1991, the Administrator of the Animal and Plant Health Inspection Service ("APHIS") charged the Polches with violating the HPA. Specifically, the complaint alleged the Polches allowed the entry of their horse, Flashing Gold, in a horse show while it was sore, in violation of 15 U.S.C. § 1824(2)(D).

Appendix E

The Polches filed an answer admitting they owned Flashing Gold and a motion for discovery which the administrative law judge ("ALJ") denied.

In July 1991, the ALJ held a pre-hearing conference and ordered APHIS and the Polches to exchange lists of exhibits and witnesses and to file the lists with the hearing clerk. Counsel for APHIS filed the list with the hearing clerk and mailed a copy to the Polches on July 24, 1991. Neither the hearing clerk nor the APHIS received a list from the Polches.

After a hearing, the ALJ concluded the Polches violated the HPA by allowing the entry of Flashing Gold in a show while the horse was sore as defined by the HPA and imposed a $1,000 civil penalty. The APHIS appealed the ALJ's failure to impose harsher penalties and the Polches cross-appealed the ALJ's decision and imposition of a civil penalty. The Judicial Officer affirmed the ALJ's decision, increased the civil penalty to $2,000, and imposed a one year disqualification from participating in any horse show, exhibition, sale or auction. This timely appeal followed.

On appeal, the Polches argue: (1) the ALJ's denial of their motion for discovery violated their constitutional guarantees of due process; and (2) the Judicial Officer abused his discretion by modifying the civil penalty imposed by the ALJ. Having carefully considered the record and the issues presented in the briefs and at oral argument, we find no error warranting reversal. We, therefore, **AFFIRM** the order of Judicial Officer Donald A. Campbell.

BOYCE F. MARTIN, JR., Circuit Judge, concurring. Although I agree that existing precedent dictates the conclusion

reached by the majority, I write separately to express my view that this case presents a clear case of abuse of governmental authority. Simply put, I question the value of an administrative process in which a judicial officer can substitute at his discretion, and without granting the petitioner any further hearing, a harsher penalty than that imposed by an administrative law judge after reasoned analysis. I strongly support the Department of Agriculture's vigilant enforcement of the Horse Protection Act. Such enforcement, however, should not come at the expense of even the worst offender's due process rights.

(2)

Supreme Court, U.S.
FILED
JUN 6 - 1995
CLERK

No. 94-1665

In the Supreme Court of the United States

OCTOBER TERM, 1994

F. DALE ROWLAND AND DENISE ROWLAND,
PETITIONERS

v.

DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supported the conclusion that the scars observed on petitioners' horse were located on the horse's pasterns.

2. Whether the interpretation of the Scar Rule, 9 C.F.R. 11.3, applied by the Secretary of Agriculture in finding that petitioners violated the Horse Protection Act, 15 U.S.C. 1824, is arbitrary and capricious or contrary to law.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 43 F.3d 1112. The final decision of the Secretary of Agriculture (Pet. App. 9a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1995. The petition for a writ of certiorari was filed on April 11, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Horse Protection Act (Act), 15 U.S.C. 1821-1831, prohibits showing or exhibiting, or entering for the purpose of showing or exhibiting, any horse that is "sore." 15 U.S.C. 1824(2). A horse is considered sore if its limbs have been purposefully injured or irritated in training. 15 U.S.C. 1821(3). The Act was designed to prevent the "cruel and inhumane" practice (15 U.S.C. 1822) of "soring" horses to improve their performance, by, for example, inducing the high stepping gait for which Tennessee Walking Horses are known. Pet. App. 2a.

2. In June 1991, petitioners entered "Quarterback Stock," their champion Tennessee Walking Horse, in the Greenback Classic Horse Show at Randolph, Ohio. Pet. App. 58a. Before Quarterback Stock entered the ring, its legs were inspected by a Designated Qualified Person (DQP)[1] for signs of soring. The DQP approved Quarterback Stock for competition. *Id.* at 2a. The two United States Department of Agriculture (USDA) veterinarians who inspected Quarterback Stock, however, noted bilateral raised hairless scars on the horse and concluded, by applying the Scar Rule, 9 C.F.R. 11.3, that Quarterback Stock was "sore." Pet. App. 2a-3a, 6a. Under the Scar Rule, a horse is considered sore if the pastern areas of its legs show any evidence of abuse, which includes, but is not limited to, excessive loss of

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[1] Under the Act and its implementing regulations, the management of a horse show or exhibition is required to employ a DQP "to inspect horses to detect or diagnose soring." 9 C.F.R. 11.7; see also 15 U.S.C. 1823(c). The failure to employ a DQP may subject management to liability under the Act if a sore horse is shown or exhibited. 15 U.S.C. 1824(3).

hair.[2] Both USDA veterinarians noted that Quarterback Stock showed no signs of sensitivity in the scarred area.

3. The Animal and Plant Health Inspection Service (APHIS), a division of USDA, filed an administrative complaint charging petitioners with entering a sore horse in competition in violation of the Act. Pet. App. 54a. APHIS requested that civil penalties be imposed and that petitioners be disqualified from participating in horse exhibitions. *Ibid.* Following a disciplinary hearing, the administrative law judge (ALJ) dismissed the complaint. *Id.* at 54a-77a. Although the ALJ credited the testimony of the USDA veterinarians and found that the bilateral scars on the pastern area of Quarterback Stock's legs were indicative of soring, the ALJ nevertheless concluded that the horse had healed as fully as possible and therefore could not be considered "sore" under the Scar Rule. *Id.* at 71a-76a. The ALJ construed the Scar Rule as applying only to scarred horses that still suffered from injuries incurred in the soring process, not to scarred horses that no longer exhibited physical sensitivity in the scarred area. *Id.* at 72a, 76a.[3]

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[2] The Scar Rule provides in relevant part that "[t]he anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of * * * evidence of abuse indicative of soring including, but not limited to, excessive loss of hair." 9 C.F.R. 11.3. Any horse not meeting the Scar Rule criteria "shall be considered to be 'sore.'" *Ibid.*

[3] The ALJ based his interpretation of the Scar Rule on a comment made by the Secretary in the *Federal Register* in conjunction with publication of the final rule. Pet. App. 71a. The Secretary, in response to a comment criticizing the Scar Rule's "once sore-always sore" presumption, stated that "it is

USDA appealed to the Judicial Officer,[4] who affirmed the ALJ's factual findings but rejected his interpretation of the Scar Rule. Pet. App. 9a-53a. The Judicial Officer determined that the Scar Rule is "clear and unambiguous," its language plainly stating that "all" horses born after October 1, 1975, that "do not meet the following scar rule criteria shall be considered to be 'sore' and are subject to all prohibitions * * * of the Act." *Id.* at 37a (quoting 9 C.F.R. 11.3), 41a. To construe the Rule *not* to reach horses that plainly showed evidence of abuse not only would be contrary to the language of the Rule, the Judicial Officer reasoned, but would also undermine "the purpose of the Act * * * to end the practice of soring, not just the showing of sore horses." *Id.* at 44a.

Finally, the Judicial Officer concluded that the comments accompanying the promulgation of the Scar Rule did not support the ALJ's interpretation of the Rule. The Judicial Officer pointed out that in response to a proposal to eliminate "the concept of 'once sore-always sore,' which is associated with the scar rule," the Secretary found "no justification to change the proposed scar rule or its intent." Pet. App. 42a-43a (quoting 44 Fed. Reg. 25,176 (1979)). Accordingly, the Judicial Officer imposed on petitioners a civil penalty of $2,000 and disqualified them

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conceivable that such a scarred horse could be restored to a satisfactory condition with proper care, rest, and time." 44 Fed. Reg. 25,176 (1979).

[4] The Secretary of Agriculture has delegated final administrative authority to the Judicial Officer to decide cases subject to 5 U.S.C. 556 and 5 U.S.C. 557. 7 C.F.R. 2.35.

from participating in horse shows for one year. Pet. App. 51a-52a.

4. The court of appeals denied a petition for review. Pet. App. 1a-8a. The court concluded that there was substantial evidence to support the Secretary's ruling that the horse was sore. *Id.* at 5a-6a. The court also concluded that the Secretary's interpretation of the Scar Rule is reasonable. *Id.* at 7a-8a. It reasoned that the Scar Rule explicitly requires that a horse be deemed sore unless its pasterns are free of evidence of abuse, including excessive loss of hair, and that an interpretation that would "allow scarred horses to compete because they are no longer in pain" would "eventually reward trainers who sore their horses," a result contrary to the purposes of the Act. *Id.* at 8a.

ARGUMENT

1. Petitioners contend (Pet. 9-11) that the court of appeals erred in upholding the Secretary's finding that Quarterback Stock was "sore" because there was conflicting evidence as to the location of the scars. Petitioners rely (Pet. 7) on the examination notes made by both USDA veterinarians indicating that scars were observed on Quarterback Stock's fetlocks, contending that the horse was not scarred on the pasterns as required by the Scar Rule.

The court of appeals concluded that "there was sufficient evidence to support the finding that scarring was present in the pastern area." Pet. App. 6a. It noted that both USDA veterinarians had testified that their notations of scarred "fetlocks" were not intended to exclude the pastern area. *Ibid.* The court cited the testimony of USDA veterinarian Dr. Gwen Lee who testified that scars on Quarter-

back Stock were "at the top of the pastern joint . . . towards the fetlock area." *Ibid.* The court also referred to the explanation given by USDA veterinarian Dr. Miava Binkley, who testified that she had referred to the fetlocks to "remind [her] these [scars] were slightly unusual, they were near the fetlocks, because they were slightly different than some other ones that [she] would normally see."[5] *Ibid.* Noting that the ALJ and the Judicial Officer both credited the USDA veterinarians' testimony, the court sustained the administrative findings that the scars were in the pastern area. *Ibid.* Further review of those factual findings—concurred in by the ALJ, the Judicial Officer, and the court of appeals—is not warranted. Cf. *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 n.5 (1985) (noting Court's general reluctance to disturb findings of fact concurred in by two lower courts); *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (same).

2. Petitioners contend (Pet. 12-18) that the Secretary's construction of the Scar Rule is arbitrary and capricious and contrary to the Act, and that the court of appeals erred in upholding that interpretation. Petitioners rely (Pet. 13) on a comment that accompanied the promulgation of the Rule, in which the Secretary noted that it was "conceivable" that "a scarred horse could be restored to a satisfactory condition with proper care, rest, and time." 44 Fed. Reg. 25,176 (1979). Petitioners claim that this statement demonstrates that the Secretary

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[5] Dr. Binkley further explained that the long pastern bone extends to the fetlock joint and that the term "fetlock" is used "fairly loosely" by many horsemen "to refer to the [fetlock] joint or the area around the joint." Pet. App. 62a-63a.

misconstrued the Scar Rule by applying it to a scarred horse that was in no apparent pain.

"It is well established that an agency's construction of its own regulations is entitled to substantial deference." *Martin* v. *OSHRC*, 499 U.S. 144, 150 (1991) (internal quotation marks omitted). Indeed, "the agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994) (internal quotation marks omitted). In this case, as both the court of appeals and the Judicial Officer correctly noted (Pet. App. 7a, 41a), the plain language of the Scar Rule supports the Secretary's interpretation: The Rule unambiguously provides that a horse "*must be free* of * * * bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair," or the horse "*shall* be considered to be 'sore' and * * * subject to all prohibitions * * * of the Act." 9 C.F.R. 11.3 (emphasis added). The Rule contains no exemption for horses that show evidence of abuse, but do not exhibit physical sensitivity in the scarred area.

Even if a single statement in the regulatory history could be taken to alter the meaning of a regulation as clear as the Scar Rule, the statement on which petitioners rely does not undermine the Secretary's interpretation. In response to a suggestion that the Secretary eliminate "the concept of 'once sore-always sore,' which is associated with the scar rule," the Secretary responded by stating:

> The Department would point out * * * that the scar rule applies only to horses that were foaled and trained well after the passage of the Horse Protection Act of 1970 * * *. Such horses should

> therefore bear no scars whatsoever if the law were being complied with. Additionally, it is conceivable that such a scarred horse could be restored to a satisfactory condition with proper care, rest, and time. The Department therefore *finds no justification to change* the proposed scar rule or its intent.

44 Fed. Reg. 25,176 (1979) (Pet. App. 43a) (emphasis added). Contrary to petitioners' contention, this comment plainly expresses the Secretary's intention *not* to eliminate the "once sore-always sore" presumption associated with the Rule. The comment on which petitioners rely thus is properly understood, as the Judicial Officer explained, to mean only that a scarred horse conceivably could heal sufficiently so that it would no longer bear scars or evidence of soring, and thus would not fall within the ambit of the Scar Rule. Pet. App. 42a-43a.

The court of appeals correctly concluded that there was no basis for finding the Secretary's interpretation of the Scar Rule arbitrary and capricious. Pet. App. 7a-8a. Petitioners provide no support whatsoever for their contention (Pet. 4) that the courts of appeals have interpreted the Act and the regulations inconsistently. Accordingly, no further review is warranted.[6]

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[6] Petitioners also assert for the first time that they were deprived of due process under the Fifth Amendment because the Judicial Officer did not conduct a hearing. Pet. 5-6. This Court ordinarily declines to consider claims not raised before or addressed by the court of appeals. *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Because petitioners had the opportunity to raise their due process challenge below, this Court should adhere to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1995

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its general practice and refuse to consider petitioner's untimely claim. See *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987) (refusing to consider due process claim that could have been raised before the Court of Military Appeals). In any event, petitioners had an evidentiary hearing before an ALJ. No further administrative hearing was required.